UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

9 November 1993

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

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Re: *Instructional Systems, Inc.* v. *Computer Curriculum Corp.*
Civil Action No. 89-502 (AJL)

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Introduction

Currently before the court is a motion of defendant Computer Curriculum Corp. ("CCC") for partial summary judgment pursuant to Fed. R. Civ. P. 56.[1] The motion is addressed to that portion

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[1] In support of its motion for partial summary judgment, CCC submitted the following: Memorandum of Law in Support of Defendant Computer Curriculum Corporation's Motion for Summary Judgment on the Remaining Counts of the Complaint (the "CCC Moving Brief"); Statement of Material Facts Not in Dispute (the "CCC 12G Statement") (attached as Appendix to the Moving Brief); Affidavit of William Slater, dated 25 June 1993 (the "Slater Aff."); Affidavit of Sidney Rosdeitcher, dated 25 June 1993 (the "Rosdeitcher Aff."); Certification of Ronald F. Fortune, dated 30 August 1993 (the "Fortune Certif."); Certification of Jay Greenfield, dated 27 August 1993 (the "Greenfield Certif."); Reply Memorandum of Defendant Computer Curriculum Corporation in Support of Its Motion for Summary Judgment on the Remaining Claims of the Complaint (the "Reply Brief").

In opposition to the motion for partial summary judgment, plaintiff Instructional Systems, Inc. ("ISI") submitted the following: Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment (the "ISI Opposition Brief"); General Rule 12G Statement (the "ISI 12G Statement"); Certification of Douglas S. Eakeley, dated 18 August 1993 (the "Eakeley Certif.").

Oral argument was heard on 12 October 1993. At oral argument, the parties were asked to submit additional briefing to identify exactly what issues were remanded to the state courts in 1989 and what issues were resolved by the state courts. *See* Transcript of Proceedings, 12 October 1993, at 2-3. In connection with that request, CCC submitted the following: Supplemental Memorandum of Defendant Computer Curriculum Corporation in Support of its Motion for Summary Judgment on the Remaining Claims of the Complaint (the "CCC Supplemental Brief"); Supplemental Reply Memorandum of Defendant Computer Curriculum Corporation in Support of its Motion for Summary Judgment on the Remaining Claims of the Complaint (the "CCC Supplemental Reply Brief"). ISI submitted the following: Plaintiff's Supplemental Submission in Opposition to Defendant's Motion for Summary Judgment (the "ISI Supplemental Brief"); Appendix to Plaintiff's Supplemental Submission in

(continued...)

of count one of the complaint, filed 30 January 1989 (the "Complaint") by ISI, which was not dismissed on partial summary judgment in *Instructional Systems, Inc.* v. *Computer Curriculum Corp.*, 826 F. Supp. 831 (D.N.J. 1993) ("*Instructional Systems II*"), as well as counts two through seven of the Complaint, is granted.

For the reasons set forth below, the aspect of the CCC motion for summary judgment addressed to the portion of count one of the Complaint which alleges a violation of N.J.S.A. § 56:10-7(e) is denied; the aspect of the CCC's motion for summary judgment addressed to that portion of count one of the Complaint which alleges a violation of N.J.S.A. § 56:10-5 and is addressed to counts two through seven of the Complaint is granted.

[1/](...continued)
Opposition to Defendant's Motion for Summary Judgment (the "ISI Supplemental Appendix"); Plaintiff's Reply Supplemental Submission in Opposition to Defendant's Motion for Summary Judgment (the "ISI Supplemental Reply Brief").

In response to court's request for additional documents made in a letter, dated 21 October 1993, CCC submitted the following documents: Documents Requested in Letter of Judge Lechner Dated 21 October 1993, attaching Exhibits 4 to 36 (the "CCC Exhibits"); Appendix - Volume I, submitted to the New Jersey Appellate Division (the "CCC Appendix Vol. I"); Appendix - Volume II, submitted to the New Jersey Appellate Division (the "CCC Appendix Vol. II"); Appendix - Volume III, submitted to the New Jersey Appellate Division (the "CCC Appendix Vol. III"); Appendix - Volume IV, submitted to the New Jersey Appellate Division (the "CCC Appendix Vol. IV"); Transcripts of Proceedings, submitted to the New Jersey Appellate Division. ISI submitted the following: Volume I to the Rochford Certification (the "ISI Vol. I"); Volume II to the Rochford Certification (the "ISI Vol. II"); Volume III to the Rochford Certification (the "ISI Vol. III"); Volume IV to the Rochford Certification (the "ISI Vol. IV"); Volume V to the Rochford Certification (the "ISI Vol. V").

Facts

A. The Parties and Their Relationship

1. The Parties

CCC is a Delaware corporation with its principal place of business in Palo Alto, California. Complaint, ¶ 4; Defendant Computer Curriculum Corporation's Answer to Complaint, Affirmative Defenses and Counterclaims, filed 27 March 1989, ¶ 2. Since the mid-1970s, CCC has developed and produced computer software, hardware and other products known as integrated learning systems (the "Integrated Learning Systems").[2/] Suppes Decl., ¶ 2. CCC sells the Integrated Learning Systems to

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[2/] ISI describes the Integrated Learning Systems as follows:

> The heart of the system is a series of computer software programs, described as "courseware," stored in a powerful host computer called the "MICROHOST," and student learning stations which are themselves micro-computers, equipped with display screens and keyboards. The student interacts with the courseware through the keyboard and screen. This system is capable of providing as many as 128 students simultaneously, at as many as 128 separate remote locations, with access to approximately 30 multi-year courses, many of which span the entire curriculum from Kindergarten through eighth grade, and in some cases beyond.

Certification of Phyllis Kaminer ("Kaminer"), dated 13 June 1989 (the "Kaminer Certif."), attached as Exhibit A to Eakeley Certif., ¶ 33; *see* Memorandum of Law in Support of Defendant Computer Curriculum Corporation's Motion for Partial Summary Judgment Based on the Commerce Clause, dated 11 January 1993 (the "Commerce Clause Moving Brief"), at 3-4; Declaration of Patrick Suppes ("Suppes") in Opposition to Plaintiff's Application for a Preliminary Injunction and Motion for Partial Summary Judgment and in support of Defendant's Motion for Partial Summary Judgment (the "Suppes Decl."), filed 27 June 1989, ¶ 2.

purchasers located throughout the United States. *Id.* School districts are the primary purchasers of Integrated Learning Systems. *Id.*

CCC was founded by Suppes who is "a recognized authority in the field of education" and is "widely regarded as a preeminent leader in the development of computer assisted instruction." Kaminer Certif., ¶¶ 36-37. Suppes was also the president and chief executive officer of CCC and owned approximately eighty percent of the stock of CCC. *Id.*, ¶ 36.

ISI is a New Jersey corporation with its place of business in Hackensack, New Jersey. Complaint, ¶¶ 1-2; Kaminer Certif., ¶ 9. ISI was formed by Kaminer[3] under the name Educomp of New Jersey.[4] Kaminer Certif., ¶ 4. The name was later changed

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[3] Kaminer has a Bachelor of Arts degree in mathematics from Brooklyn College and a Masters of Arts degree in mathematics from City College of New York. Kaminer Certif., ¶ 2. She also has an Masters in Business Administration from Columbia University. *Id.* She worked as a computer programmer in the physics department at the Brookhaven National Laboratories and as a programmer and programming supervisor at Columbia University in the Electrical Engineering Department. *Id.* Kaminer then joined G.C. Dewey Co. where she worked on computer applications for military and government contracts. *Id.* She subsequently joined ITT as a supervisor in charge of programming for various contracts and developing new proposals for future computer projects. *Id.* Kaminer then served as the assistant director for an office involved with computer matters for the Secretary of the United States Department of Health Education and Welfare. *Id.* Subsequently, she worked for Educational Data Services, a company involved in computers and education. *Id.* In 1972, she became involved with Educomp of Connecticut. *Id.*

[4] Educomp of New Jersey was incorporated in 1971 or 1972. Excerpts of the Kaminer Deposition on 2 May and 11 May 1989, attached as Exhibit C to the Rosdeitcher Aff. (the "Kaminer Dep. Tr."), at 20. At that time, Kaminer held one hundred percent of its stock. *Id.*

to ISI. *Id.*, ¶ 5. ISI has maintained its offices in New Jersey; its sales force and consultants work out of New Jersey. *Id.*, ¶ 13.

2. The Initial Meeting

Kaminer learned of CCC in the mid-1970s while she was working with Educomp of Connecticut.[9] Kaminer Certif., ¶ 3. Educomp of Connecticut was a company involved in computers and education. *Id.* Kaminer was assisting Educomp of Connecticut in expanding its marketing efforts into the Mid-Atlantic states. *Id.* Kaminer's first big sale of Educomp products was to the Englewood, New Jersey school system. In the process of that sale, Kaminer discovered the Englewood school system was also interested in certain CCC mathematics courseware. *Id.* Kaminer investigated CCC for the Englewood school system and, in connection with that investigation, visited CCC's facilities in California. *Id.* At the time of Kaminer's visit, CCC had approximately six employees. *Id.*

Although the Englewood school system ultimately decided against purchasing the CCC courseware, Kaminer's interest in CCC continued. *Id.*, ¶ 4. In approximately 1975, Kaminer approached CCC with a proposed arrangement whereby Kaminer would market CCC products in the northeastern United States. *Id.*

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[9] Kaminer's company, Educomp of New Jersey, had an agreement with Educomp of Connecticut for use of the name "Educomp." Kaminer Dep. Tr. at 21-22. Educomp of Connecticut developed new computer programs and assembled publicly available software. *Id.* at 23-24. Educomp of New Jersey then packaged that software in a way schools would find convenient. *Id.* at 24. Educomp of New Jersey sold the software to schools in New York, New Jersey, Maryland and Delaware. *Id.* Educomp of Connecticut concentrated its sales efforts on the New England area. *Id.* Both Educomp of New Jersey and Educomp of Connecticut resold hardware to schools in their respective areas, which hardware they purchased from Digital Equipment Corporation. *Id.* at 24-25.

The products were to be marketed through Kaminer's corporation, ISI (at that time known as Educomp of New Jersey). *Id.* CCC, which in 1974 had decided to expand its marketing efforts into the northeastern United States, agreed to the arrangement. *Id.*, ¶¶ 6, 39. Kaminer hired two employees to assist her in marketing CCC products. *Id.*, ¶ 6. By 1980, CCC and ISI agreed ISI would have an exclusive distributorship in the marketing territory consisting of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington, D.C. (the "Marketing Territory"). *Id.*, ¶¶ 7, 41; ISI 12G Statement, ¶ 2; CCC 12G Statement, ¶ 1.

3. The Relationship

ISI began its operations as an exclusive distributor of CCC products in Englewood Cliffs, New Jersey (the "Englewood Facility"). Kaminer Certif., ¶ 9. ISI remained at that location until 1986. *Id.*, ¶ 11. The Englewood Facility included a time sharing center for the sale of Microhost computers.[9] *Id.*, ¶ 10. The Englewood Facility also included computers for display and demonstrations and a conference room/auditorium in which ISI conducted customer demonstrations of hardware, software and courseware as well as marketing meetings and training activities. *Id.*

In 1986, ISI moved its marketing facility to Hackensack, New Jersey (the "Hackensack Facility"). *Id.*, ¶ 11. The Hackensack Facility appears to be a larger version of the Englewood Facility. *See id.*

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[9] As stated, *supra* n.2, Microhost computers were used to run CCC software and courseware. The Englewood Facility's time sharing center also provided facilities for the sale of the CCC-17 computer, predecessor to the Microhost computer. Kaminer Certif., ¶ 10.

As a re-seller of CCC products, ISI purchased and licensed those products from CCC and, in turn, sold and sublicensed those products to end-users in the Marketing Territory. ISI also provided a system of training and support for its customers including orientation programs in the use of the CCC system. *Id.*, ¶ 44 & n.2.

ISI contends CCC products "are a unique combination of hardware and software whose identity is integrally related to that of ISI."[2/] ISI 12G Statement, ¶ 4. From 1985 through 1989, sales of CCC products constituted ninety-seven percent of ISI's total sales revenues. ISI 12G Statement, ¶ 5; Kaminer Certif., ¶ 80. ISI, meanwhile, became the largest single customer of CCC, with CCC sales to ISI constituting between twenty-one to thirty percent of CCC's gross revenues. Kaminer Certif., ¶ 57.

In promoting and selling CCC products, ISI contends it made "significant franchise specific investments." ISI 12G Statement, ¶ 8. For example, ISI asserts it outfitted the Hackensack Facility with specialized CCC equipment so that it could demonstrate CCC products for prospective customers and train existing customers in a simulated classroom setting. Kaminer Certif., ¶¶ 18-20. ISI asserts other CCC-specific arrangements included the purchase and distribution of flyers, brochures and marketing letters bearing the CCC name, logo and trademark and the display of the CCC name, logo and trademark at the Hackensack Facility. *Id.*, ¶¶ 16, 19, 21, 23.

ISI claims to have spent millions of dollars on its sales and promotional activities for CCC products. This expenditure included

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[2/] ISI further contends there is no alternative line of products ISI can substitute and sell in place of CCC products. ISI 12G Statement, ¶ 5; Kaminer Supplemental Certif., ¶ 12.

special presentations, seminars and cable television programs on educational issues, sponsoring customer visits to the CCC headquarters in California, developing proprietary software sold by ISI at a loss to itself in order to attract potential customers, hiring consultants and conducting studies on educational issues and computer assisted instruction. *Id.*, ¶¶ 45-46, 61-63.

Despite the fact both ISI and CCC began their relationship as two small, private companies, owned by sophisticated persons knowledgeable about the computer industry, ISI maintains it "has always been at the mercy of CCC," and CCC "has exerted significant control over the manner in which ISI conducts its business." Kaminer Supplemental Certif., ¶ 32; Complaint, ¶ 15. ISI explains the "myriad of ways" in which CCC exercised that control as follows:

> CCC controls ISI from the way we do our inspections, from the way that we train our staff. In fact, they [CCC] train us. From the way that everything that I [Kaminer] want to do I have to ask their permission for, special this, special that.... From the way that every document that we sent in with respect to site inspections and layouts we would get criticisms and critiques on. CCC would dominate and has dominated almost every aspect of what we do.

Kaminer Dep. Tr. at 47. ISI contends it has been CCC's "clear intention to make ISI almost entirely dependent on CCC." Kaminer Certif., ¶ 49; *see id.*, ¶¶ 51(a)-(i), 52. ISI explains that the ability of CCC to control it arises from the exclusivity of the CCC

product line and the role of ISI as the exclusive distributor of those products.[1] Kaminer Supplemental Certif., ¶ 32.

4. The ISI Understanding of the Relationship with CCC

From the outset of their relationship, ISI and CCC entered into a series of written contracts, each for a definite term. Kaminer Certif., ¶ 42. ISI states that upon termination of one agreement, a renewal contract was usually presented to Kaminer by Suppes as a "*fait accompli*." *Id.*, ¶ 43. It is contended no material discussion or negotiation surrounded these renewal contracts. *Id.*

CCC asserts ISI, early in the relationship, proposed it be given a "perpetual distributorship." Commerce Clause Moving Brief at 5; *see* Affidavit of Ronald F. Fortune, submitted in support of CCC's motion for partial summary judgment on the Commerce Clause issue, dated 8 January 1993 (the "Fortune Aff."), ¶ 12; Suppes Decl., ¶ 5; Kaminer Dep. Tr. at 42. CCC rejected the proposal. Commerce Clause Moving Brief at 5; *see* Fortune Aff., ¶ 12; Suppes Decl., ¶ 5. According to CCC, a series of temporally finite contracts was preferable because "[t]he computer industry is very dynamic."[2] Commerce Clause Moving

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[1] Despite what ISI describes as the overwhelming control of it by CCC, sometime in 1985, ISI managed to "scrape together" funds to attempt to buy CCC. *See* Kaminer Supplemental Certif., ¶ 32; Suppes Decl., ¶ 9. ISI states it was concerned about its future upon learning in 1985 that Suppes was considering selling CCC. Kaminer Supplemental Certif., ¶ 32. Suppes did not sell CCC at that time.

[2] In fact, CCC states that the Integrated Learning Systems industry "ha[s] undergone a dramatic transformation" in recent years. Commerce Clause Moving Brief at 5; *see also* Fortune Aff., ¶ 2. CCC states:

(continued...)

Brief at 5; *see also* Fortune Aff., ¶ 12. ISI agreed with the need for sequential contracts with limited terms because it recognized "that conditions in the market, as well as technological changes, might require fine-tuning of the contract's provisions."[10] ISI Opposition Brief at 5; *see* Kaminer Certif., ¶ 24; Kaminer Dep. Tr. at 41-42.

ISI contends, however, that the decision to structure the arrangement between CCC and itself through a series of sequential contracts did not effect its understanding that the relationship between itself and CCC would be ongoing. ISI Opposition Brief at 5; Kaminer Certif., ¶ 40. ISI's understanding it would continue

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[9](...continued)

> What was [in the 1970s] a relatively obscure group of small start-up firms is now a rapidly growing, highly competitive $300 million business that has attracted the attention of Fortune 500 companies. Jostens, a publicly held company that has entered the I[ntegrated] L[earning] S[ystems] business in 1986, has surpassed CCC in terms of sales revenues and last year acquired the third-largest I[ntegrated] L[earning] S[ystems] firm. Several other competitors, including IBM, have also emerged. CCC itself was acquired in 1990 by Simon & Schuster, Inc. The business also has expanded into segments, such as job training for business, industry and correctional institutions. It is predicted that by 1996, sales of Integrated Learning Systems will reach $750 million annually.
>
> Commerce Clause Moving Brief at 5 n.4 (citations omitted); *see also* Fortune Aff., 2-15 (discussing increase in sales and change in market of Integrated Learning Systems). It is predicted that by 1996, sales of Integrated Learning Systems will reach $750 million annually. Fortune Aff., ¶ 3. ISI agrees competition in the Integrated Learning systems business has "become much more intense." Kaminer Certif., ¶ 60.

[10] In fact, some provisions did change from one contract to the next. Changes typically related to operational matters such as discounts and copyright protection. Kaminer Certif., ¶ 42.

indefinitely as the sole distributor of CCC products was allegedly established at the beginning of CCC's and ISI's relationship. ISI Opposition Brief at 5; Kaminer Certif., ¶ 40.

ISI claims that when CCC offered it the exclusive distributorship in 1975, Suppes "told [Kaminer] that ISI would continue to be CCC's sole and exclusive distributor as long as ISI was able to meet reasonable marketing quotas."[11] ISI opposition Brief at 5; Kaminer Certif., ¶ 40. As evidence of this understanding, ISI points to the following two incidents:

> [Suppes] once sent me [Kaminer] a letter ... it was in the early years, certainly ten years ago, in which he had been talking about setting guidelines or targets or quotas, I'm sorry I don't have the exact wording, but it's something to the degree that there is no point in setting goals if the relationship is not continued if those goals are met.[12] Then I remember a time that we had lunch together in New

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[11] This contention, however, belies the wording of the agreement, signed on 12 March 1975 (the "1975 Agreement"), which included a provision whereby the 1975 Agreement automatically expired on 30 June 1977. *See* 1975 Agreement, attached as Exhibit A to the Suppes Decl., ¶ XXXI. The 1975 Agreement contained a provision which made clear that the written agreement constituted the complete agreement of the parties. *Id.*

[12] The letter Kaminer referred to stated in pertinent part:

> Upon reflection, putting in the milestones on the north and south territories at the end of three years did not make much sense unless the contract were to continue after those dates. We are therefore writing a five-year contract with no conditions on the core territory as we discussed when you were here.

Letter from CCC to ISI, dated 27 June 1977 (the "27 June 1977 Letter"), attached as Exhibit E to the Rosdeitcher Aff.

> York.... I think it was in 1976, ... and in our conversation he said, as I was describing a project [ISI] had in Delaware, ... he made a remark that always struck me and I remembered it very well in which he said he was very pleased with the work [ISI was] doing and, ... he said a lot of things but the one of the remarks that I remember him saying was, as far as I'm concerned, you're queen of the east coast. That doesn't sound like a temporary—didn't sound to me like a temporary situation. We never, that I can remember, I can never remember any time we discussed termination.

Kaminer Dep. Tr. at 29-31; *see* Kaminer Certif., ¶ 40; *see also* Excerpts from ISI's Responses to CCC's First Set of Interrogatories, dated May 10, 1989, attached as Exhibit B to the Rosdeitcher Aff., at 9.

5. The 1975 Agreement

When ISI, at that time Educomp of New Jersey, and CCC signed the 1975 Agreement, their first agreement, ISI obtained an exclusive distributorship of CCC products in Connecticut, New Jersey, New York and eastern Pennsylvania (the "1975 Marketing Territory"). 1975 Agreement, ¶ I(A).

The 1975 Agreement also gave ISI a discount of twenty-five percent on CCC products. *Id.*, ¶ III(A). The discount rate was to be adjusted based on the annual volume of discountable items purchased by ISI. *Id.*, ¶ III(A) and (B). The 1975 Agreement required ISI to use its "best efforts" to sell CCC products within the 1975 Marketing Territory and prohibited ISI from selling any competitive products. *Id.*, ¶¶ XVII, IV(C).

The 1975 Agreement stated that it was the parties' entire understanding and that it could be amended only by written

agreement. *Id.*, ¶ XXXI. By its terms, the 1975 Agreement expired on 30 June 1977. *Id.*, ¶ XVIII.

6. The 1978 Agreement

On 1 May 1978,[12] ISI and CCC signed the 1978 Agreement. *See* 1978 Agreement. The 1978 Agreement gave ISI the exclusive right to purchase CCC products and resell them in the states of Delaware, New Jersey and New York (the "1978 Marketing Territory").[13] *Id.*, ¶ 1.1

The 1978 Agreement called for ISI to use its "best efforts" to promote CCC products, to take all necessary action to create and maintain a supply of CCC products in the 1978 Marketing Territory and to supplement those efforts with whatever steps CCC reasonably requested. *Id.*, ¶ 3.1. In addition, ISI's duties included

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[12] It appears that a period of approximately nine months elapsed between the time the 1975 Agreement expired on 30 June 1977, and the execution of the agreement on 1 May 1978 (the "1978 Agreement"). It is not clear whether the terms of the 1975 Agreement were extended until the execution of the 1978 Agreement or whether the parties entered into some other arrangement.

> The 27 June 1977 Letter stated in part:
>
> We [CCC] have discussed with our attorney the new contract between ISI and CCC. He feels that there are a lot of gaps in the contract that should be covered. I don't think that what we are adding will affect the substantive discussions we had ..., but it is going to take some time to draw up the new document. I shall be out of town from July 1 to July 7; we hope to have the new contract mailed to you shortly after my return.

27 June 1977 Letter.

[13] There is no discussion or explanation given for eliminating Eastern Pennsylvania from the 1978 Marketing Territory.

locating prospective customers and marketing opportunities, training and educating customers in the use of CCC products, demonstrating CCC products to potential customers and attending trade shows and conventions to promote CCC products. *Id.*, ¶ 3.2. ISI was also required to maintain no less than two full-time, fully trained marketing representatives to work exclusively within the 1978 Marketing Territory promoting CCC products and at least one employee to train proctors and teachers in the use of CCC products. *Id.*, ¶ 3.4.

The 1978 Agreement provided ISI a discount on the prices of CCC products ranging from twenty to thirty percent based on ISI's annual volume of discountable items purchased by ISI from CCC. *Id.*, ¶ 2.1 and Schedule C.

The 1978 Agreement was terminable by either party upon thirty days' notice after 1 July 1980. *Id.*, ¶ 9.4. There was no other termination or expiration provision.

> This Agreement may be terminated by either party upon giving thirty (30) days' written notice to the other party; provided, however, that neither party shall have the right to give such thirty days' notice of termination prior to July 1, 1980.... [N]either party shall incur any form of civil liability whatsoever on the basis of any termination that is effected pursuant to the terms of this paragraph....

Id. In addition, there was a merger clause which stated the 1978 Agreement "constitute[d] the entire agreement between the parties" and "supersede[d] and terminate[d] any and all prior agreements or contracts, whether oral or in writing." *Id.*, Article XIX.

7. The 1980 Agreement

ISI and CCC entered into the third written agreement On 9 October 1980 (the "1980 Agreement"). *See* 1980 Agreement, attached in CCC Appendix Vol. I at 283a-317a. The 1980 Agreement granted ISI the "exclusive right to purchase or license ... CCC products ... for the purpose of reselling, leasing or renting such [p]roducts ... in the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington D.C.," *id.*, ¶ 1.1, the Marketing Territory.

The 1980 Agreement required ISI to use its "best efforts" to promote CCC products and to "take whatever actions ... CCC may reasonably request for the purpose of ensuring the effective distribution" of CCC products in the Marketing Territory. *Id.* at ¶ 3.1(a) and (b). The 1980 Agreement increased the number of full-time, fully trained employees ISI had to maintain to market CCC products and train proctors and teachers in the use of CCC products. *See id.*, ¶ 3.4.

Under the 1980 Agreement, ISI received a twenty percent discount on the prices of CCC products. *See* 1980 Agreement, ¶ 2.2 and Schedule B. This constituted a change from the previous discount arrangements. As stated, under the 1975 Agreement, ISI received a discount rate of twenty-five percent on certain CCC products. 1975 Agreement, ¶ III(A) and (B). The 1978 Agreement established a system for calculating the discount rate, whereby the discount rate started from a base of twenty percent and then was increased or decreased according to ISI's quarterly sales volume. 1978 Agreement, ¶ 2.2 and Schedule C.

The 1980 Agreement did not contain an automatic expiration provision, but, like the 1978 Agreement, allowed either CCC or

ISI to terminate the contract upon thirty days' notice after 1 July 1985. *Id.*, ¶ 9.4. The merger clause in the 1980 Agreement provided that the contract "constitutes the entire agreement" between the parties, that the contract "supersedes and terminates any and all prior agreements or contracts" and that "no change, termination, waiver or other modification of any of the provisions [thereof] shall be binding on CCC or ISI unless in writing and signed by a duly authorized representative." 1980 Agreement, Article XX.

8. The 1984 Agreement

On 12 July 1984, CCC and ISI entered into a fourth agreement (the "1984 Agreement") appointing ISI the exclusive re-seller[15] of certain CCC products in the Marketing Territory. 1984 Agreement, attached as Exhibit A to Rosdeitcher Aff., § 2.01; CCC 12G Statement, ¶ 1. By its terms, the 1984 Agreement expired on 31 July 1989.[16] 1984 Agreement, § 13.01; CCC 12G Statement, ¶ 2. The 1984 Agreement did not contain any provision requiring renewal or offering renewal as an option beyond the expiration date. Construction of the 1984

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[15] There is no explanation for why the 1984 Agreement began referring to ISI as a "re-seller" as opposed to a "distributor." Both the 1978 Agreement and the 1980 Agreement were entitled "Distributorship Agreement." The 1975 Agreement was simply entitled the "Agreement." The 1984 Agreement, however, was entitled "Reseller Agreement."

[16] Specifically, the 1984 Agreement stated:

> Term. This Agreement shall commence on the date first written above and shall, except as otherwise provided in this Part 13, continue in effect until July 31, 1989.

1984 Agreement, ¶ 13.01 (the "Termination Provision").

Agreement was to be governed by California law. 1984 Agreement, § 14.10.

The 1984 Agreement required ISI to "use its best efforts to promote demand for and to [r]e-sell [CCC's p]roducts to the [m]arket within the Territory," to "maintain adequate facilities for such purposes" and to "employ no less than four full-time sales representatives to accomplish this purpose." 1984 Agreement, § 6.01; Kaminer Certif., ¶ 50; ISI 12G Statement, ¶ 3.

ISI was restricted from selling any products which would compete with CCC products. ISI 12G Statement, ¶ 3. In order to qualify for certain discounts on CCC products, the 1984 Agreement required ISI to adhere to a sales quota for the Marketing Territory.[17] 1984 Agreement, §§ 4.02-4.03.

The 1984 Agreement granted certain software and hardware user licenses to ISI and authorized ISI "to use CCC's name, trademark and logo in its advertising, trade shows, public relations materials and manuals." 1984 Agreement, §§ 3.01-3.03, 6.02; Kaminer Certif., ¶ 50. It was provided that these licenses and rights terminated upon expiration of the 1984 Agreement. *Id.*, §§ 3.04, 6.02. The 1984 Agreement also stated: "ISI shall not enjoy any rights in the CCC name, its trademarks or logo." *Id.*, § 6.03; *see also id.*, §§ 11.01-11.02.

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[17] CCC explained this quota/discount system as follows:

> ISI has always had discounts based upon meeting certain quotas. In other words, the greater the sales volume, the greater the discount. This is a common method of pricing with respect to distributors within the computer industry. Distributors are compensated by discounts off the suggested retail price for the equipment.

Suppes Decl., ¶ 9.

The 1984 Agreement contained a "merger clause" which stated that the 1984 Agreement represented the entire agreement between the parties and superseded any other agreements.[19] *Id.*, § 14.08; CCC 12G Statement, ¶ 3.

ISI argues that even after signing the 1984 Agreement with its Termination Provision and Merger Clause, it maintained its understanding that the relationship with CCC was a continuous one. ISI Opposition Brief 5-6. CCC, on the other hand, insists it "did not promise ISI, nor did [it] and ISI mutually understand, that CCC would renew the 1984 Agreement upon its expiration on July 31, 1989." CCC 12G Statement, ¶ 4. CCC states further that, prior to this litigation, ISI never claimed that its distributorship of CCC products was to continue in perpetuity. Suppes Decl., ¶ 5.

9. Events Leading to the 1989 Agreement

CCC asserts that, during the course of the 1984 Agreement, it met with ISI and "expressed concern with ISI's performance and ability to compete" in the Marketing Territory. Commerce Clause Moving Brief at 6; *see also* Suppes Decl., ¶¶ 8, 10. CCC

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[19] Section 14.08 stated:

> Entire Agreement. This Agreement, including the Schedules attached hereto, represents the entire agreement between the parties relating to the subject matter hereof, and shall supersede any other agreements, whether oral or written. There are no understandings, representations or warranties of any kind except as expressly set forth in this Agreement. No waiver, alteration or modification of any of the provisions of or attachments to this Agreement shall be binding on any party unless in writing and signed by the party against whom enforcement of such waiver, alteration or modification is sought.

1984 Agreement, ¶ 14.08 (the "Merger Clause").

perceived that ISI was concentrating its sales efforts in only three states—Massachusetts, New Jersey and New York—and not adequately serving the seven other states and the District of Columbia (the "Eight States") within the Marketing Territory. Commerce Clause Moving Brief at 6; Suppes Decl., ¶ 8.

CCC states: "ISI was doing little or no business in ... Connecticut, Delaware, the District of Columbia, Maine, Maryland, New Hampshire, Rhode Island and Vermont." Commerce Clause Moving Brief at 6. For instance, it appears ISI made no sales in New Hampshire or Vermont from 1981 to 1989.[12] *Id.*; Kaminer Dep. Tr. at 315-16. In the same nine-year period, ISI made only two sales in Maine. Kaminer Dep. Tr. at 316. ISI, however, contends its sales force was beginning to make progress in Maine and Vermont. Kaminer Certif., ¶ 75. ISI states that in 1989 it consummated a sale in Maine of more than $300,000. *Id.* In addition, ISI was allegedly about to close a sale in Vermont of $170,000. *Id.*

On 14 January 1988, CCC wrote to ISI expressing concerns about ISI's poor selling performance in comparison with the CCC marketing efforts. Letter from CCC to ISI, dated 14 January 1988 (the "14 Jan. 1988 Letter"), attached as Exhibit C to the Suppes Decl. CCC compared the sales figures of ISI to those of its marketing department and found the comparison "quite dramatic." *Id.* at 2.

On 24 June 1988, CCC wrote ISI another letter which "review[ed] ISI's continued lack of growth and development since"

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[12] According to CCC, "[a]lthough the [E]ight [S]tates included approximately 30% of the students within [the Marketing T]erritory, they accounted for only 11% of ISI's sales revenues to CCC from 1985 through 1987." Commerce Clause Moving Brief at 6; *see also* Suppes Decl., ¶ 8.

the 14 Jan. 1988 Letter. Letter from CCC to ISI, dated 24 June 1988 (the "24 June 1988 Letter"), attached as Exhibit A to the Declaration of Ronald Fortune in Opposition to Plaintiff's Application for a Preliminary Injunction and Motion for Partial Summary Judgment and in Support of Defendant's Motion for Partial Summary Judgment, dated 26 June 1989 (the "Fortune Decl."), at 1. In the 24 June 1988 Letter, CCC compared its sales figures with those of ISI and stated:

> When we look at the three-year change from [1985] to [1988], the long term marketing efforts by ISI are very disappointing as compared to [CCC's] marketing performance. For learning stations, the three-year percentage change for ISI is a loss of 16%; for [CCC] corporate marketing, the three-year change is a dramatic growth of 142%.... The lack of ISI's growth is a serious problem.
>
> While examining ISI's sales performance, [CCC is] especially concerned about another set of data. There are a large number of states (including the District of Columbia) in your exclusive territory where there is little or no shipment of equipment.... Again, the performance of ISI is very disappointing.
>
> [W]e do appreciate the fact that ISI made its sales quota for 1987-88. Nevertheless, by comparison, [CCC] corporate marketing was 178% over quota.

Id. at 1-2.

Allegedly based upon ISI's performance, CCC determined that decreasing the area of the Marketing Territory was necessary. In the summer of 1988, CCC mailed to ISI a copy of a proposed agreement, which was to become effective 1 August 1988, and

asked ISI to sign the agreement and return it. Letter, dated 6 July 1988 (the "6 July 1988 Letter"), from CCC to ISI, attached as Exhibit E to the Suppes Decl. In the 6 July 1988 Letter, CCC (1) informed ISI that it desired to begin direct marketing of CCC products in the Eight States and (2) offered ISI a new exclusive distribution contract limiting ISI's Marketing Territory to New Jersey, New York and Massachusetts (the "Three State Marketing Territory"). *See* 6 July 1988 Letter; Kaminer Certif., ¶ 69.

ISI contends that until 1988, it had received no indication CCC was at all dissatisfied with ISI's performance.[20] Kaminer Certif., ¶ 67. To the contrary, ISI contends that in 1987, Suppes "insisted" that ISI increase its staff in the New England area. ISI Opposition Brief at 6; ISI 12G statement, ¶ 13. In response to Suppes' request, ISI did increase its staff, an undertaking, it contends, which was not specifically required by the terms of the 1984 Agreement. ISI Opposition Brief at 6; ISI 12G Statement, ¶ 13; Kaminer Certif., ¶ 59. ISI argues that this request further led it to believe CCC had no intent of terminating or altering the parties' relationship. ISI Opposition Brief at 6. In addition, ISI claims the 6 July 1988 Letter constituted CCC's first suggestion

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[20] ISI contends it was doing well in the entire Marketing Territory with $951,768 in sales in 1985, $850,508 in 1986, $1,225,598 in 1987, $1,529,431 in 1988 and projected sales for 1989 of $3,000,000 or more. ISI Opposition Brief at 6; Kaminer Certif., ¶ 73. ISI stresses that it did not account for its sales on a state-by-state basis but viewed the entire Marketing Territory as an integrated whole. Kaminer Certif., ¶ 25; *see id.* at ¶¶ 26, 28.

the Marketing Territory should be reduced.[21] ISI 12G Statement, ¶ 12.

In response to CCC's decision to reduce the Marketing Territory, ISI's representatives met with CCC personnel to explain the reason for the disparity between the sales figures of ISI and those of CCC. ISI states:

> [ISI] presented [CCC] with documentary evidence showing that the states with which [CCC] was concerned were either being significantly marketed by ISI and/or that there were factors ... which made it difficult to penetrate those states with respect to sales of [I]ntegrated [L]earning [S]ystems. These factors include the high percentage of small school districts in these states, the relative paucity of entitlement funds to purchase [I]ntegrated [L]earning [S]ystems, resistance of educators and taxing authorities to expenditure of funds in these smaller states, increased telephone charges in these smaller states which cause a disproportionate expense for the use of [I][ntegrated [L]earning [S]ystems and various similar factors.

Kaminer Certif., ¶ 68.

ISI states it received a letter on 19 December 1988, from CCC stating that if ISI did not sign a new agreement limiting ISI's exclusive distributorship to the Three State Marketing Territory by January 31, 1989, CCC would allow the 1984 Agreement to

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[21] It appears, however, that this was not the first time that the ISI marketing territory had been changed. For example, CCC indicates: "[T]he [e]astern Pennsylvania area was [once] within ISI's territory. Subsequently, this territory was removed." Suppes Decl., ¶ 6; *compare* 1975 Agreement, ¶ IA *with* 1978 Agreement, ¶ 1.1.

terminate on 31 July 1989; CCC would then market its products in the entire Marketing Territory. *Id.*, ¶ 69.

10. The 1989 Agreement

Instead of allowing the 1984 Agreement to lapse[22/] in accordance with its terms on 31 July 1989, the parties signed a new re-seller agreement on 30 January 1989 (the "1989 Agreement"), which limited ISI's exclusive distributorship to the Three State Marketing Territory. 1989 Agreement, attached as Exhibit I to the Rosdeitcher Aff., § 1.10; ISI 12G Statement, ¶ 14; CCC 12G Statement, ¶ 5.

In addition to reducing the Marketing Territory, the 1989 Agreement resulted in several other changes from the 1984 Agreement.[23/] The 1989 Agreement provided for a term of three years. *See id.*, § 13.1; 6 July 1988 Letter at 1. The 1989 Agreement, while continuing ISI's exclusive re-seller's right for CCC software and courseware in the Three State Marketing Territory, did not continue ISI's exclusive right to resell CCC hardware. 1989 Agreement, § 1.10; 6 July 1988 Letter at 2. CCC explained that anticipated agreements between CCC and two other computer companies would give those other computer companies the right to sell the hardware used to run CCC software and

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22/ CCC states that it "gave serious consideration to letting CCC's agreement with ISI ... lapse entirely when the [1984 Agreement] expired." Suppes Decl., ¶ 8.

23/ In addition to the differences discussed in the text, *infra*, the Complaint lists the following changes: the requirement that ISI provide CCC with information regarding ISI pricing and customer contracts, the requirement that ISI turn over to CCC all of its customer accounts in the Eight States and the elimination of the provision allowing ISI to purchase for resale the same CCC products offered to other resale marketers. Complaint, ¶ 35.

courseware, including the right to sell such hardware within the Marketing Territory. 6 July 1988 Letter at 2. Accordingly, CCC could no longer grant ISI an exclusive right to sell CCC hardware. *Id.*

The 1989 Agreement added restrictions on the activities which could be undertaken by Kaminer. The 1989 Agreement provided in pertinent part:

> [Kaminer], President of [ISI], hereby agrees that she will not directly or indirectly, through [ISI] or ownership in or as a director, officer, employee or independent contractor of any other entity, take any action, enter into any agreement or conduct any activity which ISI would otherwise be restricted from taking as set forth in Section 12 [of the 1989 Agreement].

Id., § 12.4. ISI is displeased with this new provision because, it claims, it prohibits personal involvement of Kaminer in any other enterprise, even as a passive investor in an unrelated industry. ISI Opposition Brief at 37 n.11. The 1989 Agreement also required Kaminer to act as a personal guarantor in particular situations:[24]

> CCC is willing to enter into [the 1989 Agreement] with ISI only if [Kaminer] provides her personal guaranty for the faithful performance of all the terms and conditions of the [1989 Agreement] and to the payment of any and all the

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[24] CCC claims it added this requirement after its distributor for the southern United States failed to pay its bills and caused CCC to terminate their relationship. CCC Moving Brief at 21 n.16; 6 July 1988 Letter at 2.

> terms and conditions of the [1989 Agreement] should ISI's financial condition detrimentally change.

1989 Agreement, § 12.5.

ISI also takes issue with the discount quotas in the 1989 Agreement. The 1989 Agreement changed the previous discount arrangement by providing that discount rates on the CCC products would be established by the "mutual agreement" of the parties on an annual basis.[2/] *Id.*, § 4.3. The previous discount arrangement set forth in the 1984 Agreement gave ISI a set discount rate of twenty percent on CCC software, courseware and hardware and an adjustable rate, ranging from twenty to thirty percent depending on how much ISI spent annually on CCC products, on particular items of CCC hardware. 1984 Agreement, §§ 4.2, 4.3 and Schedule D.

CCC explained in the 6 July 1988 Letter it was altering the structure of the discount arrangement because "the changing nature of the business is such that [CCC] will need to negotiate a yearly discount schedule. [CCC] certainly plan[s] to give [ISI] the very best terms we can in order to facilitate [ISI's] business." 6 July 1988 Letter at 2.

The 1989 Agreement also included a termination quota which allowed CCC to terminate the 1989 Agreement upon the occurrence of any of the following:

> (1) if the total annual net revenue received from the states of Massachusetts, New Jersey and New York by CCC from ISI in CCC fiscal year ending March 31, 1990 decreases by 20%

[2/] It appears, however, that the discount arrangement was changed with each new contract entered by the parties. *See* 1975 Agreement, ¶ III(A); 1978 Agreement, ¶ 2.1; 1980 Agreement, ¶ 2.2; 1984 Agreement, §§ 4.02-4.03.

> or more from the total annual revenue received from these three states by CCC from ISI in CCC fiscal year 1989 year; or
>
> if the total annual net revenue received from the states of Massachusetts, New Jersey, and New York by CCC from ISI in any CCC fiscal year decreases by 50% or more from the total annual net revenue received from these three states by CCC from ISI between April 1, 1988 and March 31, 1989.

1989 Agreement, § 13.2(d). The termination quota in the 1989 Agreement was virtually identical to that in the 1984 Agreement. *Compare* 1989 Agreement, § 13.2(d) *with* 1984 Agreement, § 13.02(d).

Although the termination and discount quotas set forth in the 1989 Agreement were nearly identical to those in the 1984 Agreement, ISI contends those provisions set "unreasonable performance standards."[2] ISI Opposition Brief at 35-38. ISI claims those provisions are particularly unreasonable when combined with the reduction of its marketing territory to the Three State Marketing Territory. ISI Opposition Brief at 36-37. ISI, however, does not dispute that it was able to meet both the termination and discount quotas for 1989 and 1990. *See id.* at 37; CCC Moving Brief at 13. ISI also claims the restrictions on Kaminer and the requirement that Kaminer be a guarantor of the 1989 Agreement are unreasonable. ISI Opposition Brief at 37 n.11.

According to ISI, it signed the 1989 Agreement "[u]nder business duress created by CCC, and without waiving its rights to

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[2] CCC, on the other hand, contends the 1989 Agreement did not contain any provision which imposed any unreasonable standards of performance on ISI. CCC 12G Statement, ¶ 6.

test the legality of the [1989 Agreement]." Complaint, ¶ 41. ISI describes this alleged business duress as follows:

> CCC ... demanded that ISI sign the [1989 Agreement] and deliver it to CCC by January 31, 1989, together with certain ISI financial statements and the personal guarantee of [ISI's principal] Phyllis Kaminer. If ISI [did] not, CCC ... threatened to revoke its offer and begin immediately to make alternate marketing arrangements to distribute its [p]roducts in New Jersey, New York and Massachusetts.
>
> CCC ... refused to enter into any meaningful negotiation to change or alter the terms of the proposed contract....
>
> The offer of the [1989 Agreement] by CCC, CCC's refusal to negotiate any of its terms and the ultimatum basis on which it was presented are part of CCC's deliberate and intentional plan to destroy ISI and its business and appropriate the goodwill and property rights that ISI has created for itself in its territory since 1974....
>
> In furtherance of this plan to destroy ISI, CCC ... refused to provide ISI with any necessary technical, pricing and discount information with respect to the new IBM CCC hardware program now being offered ... unless and until ISI execute[d] and deliver[ed] the [1989 Agreement] without change by ISI, together with the requisite financial information.

Complaint, ¶¶ 36-37, 39-40; *see also* Kaminer Certif., ¶¶ 68-69.

11. The Alleged Impact of the 1989 Agreement on ISI

Over the years, ISI claims to have invested, on average, over $200,000 per year on its sales and promotional activities for CCC products in the Marketing Territory. Kaminer Certif., ¶ 46; *see id.*, ¶ 61-65, 75; Kaminer Supplemental Certif., ¶ 5. In the process, ISI contends it developed "significant good will [sic] for CCC" and "established an 'installed base of customers' in the Marketing Territory whose continuing renewals of their licenses and upgrades of their CCC systems generate on-going profits." ISI 12G Statement, ¶ 9; Kaminer Supplemental Certif., ¶¶ 2, 14, 34.

ISI complains the elimination of the Eight States from the Marketing Territory deprives it of the fruits of its efforts in those areas. ISI argues that because the lead time for a sale of Integrated Learning Systems averages from six months to two years of promotional effort on the part of ISI, CCC is in a position to benefit in the future from the legwork ISI has already done in the Eight States. Kaminer Certif., ¶ 65; ISI 12G Statement, ¶ 10. Accordingly, ISI contends it loses all of the sales and promotional efforts expended in the Eight States, and CCC stands to receive the benefit of its hard work. ISI 12G Statement, ¶¶ 9, 11, 15.

B. The Complaint

On the same day ISI signed the 1989 Agreement, 30 January 1989, it filed this lawsuit.[27] *See* Complaint. The Complaint

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[27] The Complaint was filed in the Superior Court of New Jersey, Chancery Division, Passaic County. *See* Complaint at 1. On 6 February 1989, the case was removed to this court pursuant to 28 U.S.C. § 1441. *See* Notice of Removal, filed 6 February 1989, at 1. Jurisdiction is alleged pursuant to 28 U.S.C. § 1332. *Id.*

alleges that, although the 1984 Agreement contained a specific expiration date, it was "always understood that the relationship between [ISI and CCC] would not be terminated except for good cause." Complaint, ¶¶ 14, 18. The Complaint further alleges that, consistent with the 1984 Agreement, "ISI has fully and completely complied with the requirements of its arrangements with CCC and has successfully utilized its best efforts to develop a demand for CCC's products in the geographical area assigned to it." *Id.*, ¶ 24.

In the Complaint, ISI contends, *inter alia*, that the 1984 Agreement constituted a franchise agreement under the New Jersey Franchise Practices Act, N.J.S.A. §§ 56:10-1, *et seq.* (the "Franchise Practices Act"). Complaint, ¶ 32. ISI further alleges CCC's actions with respect to the 1989 Agreement—namely, failing to renew the 1984 Agreement without good cause and "attempting to impose unreasonable standards of performance upon ISI"—violate sections 56:10-5 and 56:10-7 of the Franchise Practices Act. *See* Complaint, ¶ 14.

The Complaint includes seven counts in which ISI alleges CCC's refusal to renew the 1984 Agreement and its demand that ISI sign the 1989 Agreement constitutes (1) a violation of the Franchise Practices Act (Count One), (2) a breach of the 1984 Agreement (Count Two), (3) a breach of the implied covenant of good faith and fair dealing (Count Three), (4) tortious interference with ISI's business relationships with prospective customers (Count Four), (5) unfair competition (Count Five), (6) unjust enrichment on CCC's part (Count Six) and (7) a breach of the fiduciary duty CCC owed ISI by virtue of "vast expertise and knowledge concerning the market and future markets for computer assisted instructional products" (Count Seven) (collectively, the "Common Law Counts"). *Id.*, ¶¶ 1-66.

For each count, ISI seeks; (1) an injunction restraining CCC from terminating the 1984 Agreement, (2) damages sustained as a result of CCC's violation or breach of the 1984 Agreement, (3) prejudgment and postjudgment interest, (4) a declaration of the rights and liabilities of CCC and ISI under "their relationship," (5) compensatory damages, (6) punitive damages, (7) attorneys' fees and (8) costs. *Id.*, ¶¶ 44, 47, 50, 53, 56, 59, 66.

C. Procedural History

In June 1989, ISI moved for a preliminary injunction to prevent the 1989 Agreement from taking effect such that the Marketing Territory would be curtailed to the Three State Marketing Territory. CCC opposed the motion for preliminary injunction and cross-moved for partial summary judgment on Count One. *See Instructional Systems II*, 826 F.Supp. at 838. In support of its cross-motion for partial summary judgment, CCC argued that applying the Franchise Practices Act to this case would be an unconstitutional restraint on interstate commerce (the "Commerce Clause Argument"). *See* Commerce Clause Moving Brief at 12.

1. Abstention

In response to the Commerce Clause Argument posed by CCC, ISI moved to have this court abstain and remand to the New Jersey Superior Court certain issues in the case pertaining to the Franchise Practices Act, pursuant to *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

By an opinion, filed 20 July 1989 ("*Instructional Systems I*"), the ISI motion for abstention was granted. *Id.*, slip op. at 3. However, only a limited number of issues arising out of Count One were remanded to state court. *Id.* at 16. Specifically, the

following issues were identified for resolution by the New Jersey state courts: (1) Whether the Franchise Practices Act has extraterritorial reach beyond the state of New Jersey and, if so, to what extent and (2) what are the definitions and standards of "community of interest," "license" and "place of business" under the Franchise Practices Act. Order, filed 27 July 1989 (the "Remand Order"), at 1.

The Remand Order was subsequently clarified to allow the New Jersey state courts to determine (1) whether there is a "community of interest" between ISI and CCC and (2) whether ISI has a "place of business" within the meaning of the Franchise Practices Act. Transcript of Proceedings, dated 28 July 1989 (the "28 July 1989 Tr."), at 4. No other issues were remanded to the New Jersey State courts.

Jurisdiction was retained by this court to apply the law established by the New Jersey courts to the facts of this case, to resolve any constitutional challenge to the Franchise Practices Act and to determine any application for injunctive relief. Remand Order at 1-2. Specifically, the Remand Order stated:

> Except as so expressly stated herein, this Court retains and reserves unto itself without limitation:
>
> (a) Jurisdiction over this matter and the parties hereto;
>
> (b) Application of the principles of law determined by the state court to the facts of this case;
>
> (c) Any constitutional challenge to the Franchise Practices Act; and
>
> (d) Any application for injunctive relief.

Id. The remaining counts of the Complaint were administratively terminated pending the state court resolution of the remanded issues arising from Count One. *Id.* at 2.

2. Resolution of Certain Franchise Practices Act Issues by the New Jersey State Courts

a. The Chancery Division

The determination of the remanded issues began in New Jersey Superior Court, Chancery Division, Passaic County. Upon remand of the case to the state court, ISI filed a complaint in the Chancery Division on 27 July 1989 (the "Second Complaint") seeking declaratory relief. Second Complaint, attached as Exhibit 7 to ISI Vol.I. In the Second Complaint, ISI essentially repeated its allegations giving rise to Count One and omitted the Common Law Counts. *Id.* The Chancery Division consolidated the Second Complaint and the case on remand "[t]o avoid confusion and to insure [the Remand Order] applies...." Ch.Div. Tr. at 4-5.

In addition to filing the Second Complaint, ISI moved in the Chancery Division for (1) summary judgment as to whether the 1984 Agreement was a franchise agreement and whether the Franchise Practices Act applied to the non-renewal of the 1984 Agreement, (2) a declaration that the 1984 Agreement was a franchise agreement under the Franchise Practices Act, that certain changes in the 1989 Agreement constituted unreasonable standards of performance under the act and that CCC violated the Franchise Practices Act by not renewing the 1984 Agreement, and (3) preliminary injunctive relief. ISI's Brief in Support of its Application for a Determination of Certain Rights Under the New Jersey Franchise Practices Act, dated 12 October 1989, included in CCC Appendix Vol. IV, at 1637a.

In opposition to ISI's motion, CCC argued that (1) New Jersey law did not apply in light of the choice of law provision in the 1984 Agreement, (2) the Franchise Practices Act did not apply to the out of state operations of New Jersey franchises, (3) the 1984 Agreement did not require ISI to maintain a "place of business" in New Jersey and (4) ISI is not a franchisee because there was no "community of interest," ISI's investments could not be construed as franchise specific investments, and ISI had not been granted a license by CCC. Defendant Computer Curriculum Corporation's Reply Brief in Opposition to Plaintiff Instructional System, Inc.'s Notice of Application for Determination of Rights Under the New Jersey Franchise Practices Act, dated 27 September 1989 (the "CCC Ch.Div. Brief"), included in CCC Appendix Vol. IV at 1465a-1490a. In addition, CCC expressly reserved its right to have the Commerce Clause issue and any application of the Franchise Practices Act to the particular facts of this case decided in Federal court. *Id.* at 1469a-1471a.

The Chancery Division, in a fact-intensive decision issued from the bench, *see generally* Transcript of Proceedings before the Honorable Arthur C. Dwyer, 30 October 1989 (the "Ch.Div. Tr."), attached as Exhibit E to the ISI Supplemental Appendix, issued a declaratory judgment stating the following:

> a) as a matter of law, the [Franchise Practices] Act applies to the [1980 Agreement] and [the 1984 Agreement];
>
> b) CCC in the [1984] Agreement[] grants to ISI a "license" as that term in used in the [Franchise Practices] Act;
>
> c) the [1984] Agreement[] and the acts of the parties thereunder create a "community of interest" as that term is used in the [Franchise Practices] Act;

> d) ISI has maintained a "place of business" as that term is used in the [Franchise Practices] Act;
>
> e) ISI and CCC "contemplated" at the time the [1984] Agreement[] [was] executed that ISI would ... maintain a "place of business" within the State of New Jersey ...;
>
> f) the [1984] Agreement[] constitute[s] "franchises" as that term is used in the [Franchise Practices] Act; and
>
> g) ... the Legislature did not intend the law of New Jersey to have extraterritorial effect....[2/]

Order of Final Judgment, filed 2 November 1989, attached as Exhibit F to the ISI Supplemental Appendix, at 2-3.

[2/] In contrast, the Remand Order, as modified by the 28 July 1989 Tr., remanded only the following issues to the state courts:

> (1) Whether the Franchise Practices Act has extraterritorial reach beyond the State of New Jersey and, if so, to what extent;
>
> (2) what is the definition and standard of "license" under the Franchise Practices Act;
>
> (3) whether there is a "community of interest" between ISI and CCC; and
>
> (4) whether ISI has a "place of business" within the meaning of the Fran[2/]chise Practices Act.

See Remand Order at 1-2; 28 July 1989 Tr. at 4. No other issues were remanded to the New Jersey state courts. Accordingly, the order of the Chancery Division strayed past the boundaries of the Remand Order by determining that (1) ISI had been granted a license by CCC and (2) the 1984 Agreement constituted a franchise agreement under the Franchise Practices Act.

At the outset of its opinion, the Chancery Division determined that it could "simply define the words as the outline of the [Remand Order] suggest[s], but as this Court has noted, Judge Lechner expects the facts to be considered."[2/] Ch.Div. Tr. at 6.

[2/] The Chancery Division had earlier stated:

> Judge Lechner further explained that the State Court would have to look at the facts of the case. Thereafter, [ISI] filed a complaint for declaratory judgment.

Ch.Div. Transcript at 4 (citing the 28 July 1989 Transcript). The Chancery Division apparently relied on the following portion of the 28 July 1989 Transcript:

> THE COURT: How do you expect the state court to pass on community of interest, license [and] extraterritoriality unless they look at facts?
>
> MR. AUERBACH: The facts of this specific case?
>
> THE COURT: What other facts would you be talking about?
>
> MR. AUERBACH: I guess they would look at those facts.
>
> THE COURT: Fine. We're in accord.

28 July 1989 Transcript at 5.

However, during the parties' appearance before this court on 9 November 1989, the following was also stated:

> My opinion and order [the Remand Order] addressed the concept of the application of the Franchise [Practices Act] beyond the territorial limits of the state of New Jersey and asked for concepts of definitions of community[] of interest, et cetera.
>
> That is what I hoped I would go through the declaratory judgment application here. [I]f [the] complaint [filed in the state court] was (continued...)

The Chancery Division initially addressed the choice-of-law provision in the 1984 Agreement which required that the 1984 Agreement be governed by the laws of California. The provision was found to be unenforceable because it violated New Jersey public policy and attempted to evade the application of the Franchise Practices Act. *See id.* at 7-20, 73-74.

The court then discussed what, in its view, were the relevant cases on the issues of license and "community of interest." Ch.Div. Tr. at 45-53 (citing *Neptune T.V. & Appliance Serv.* v. *Litton Microwave Cooking Prods. Div. Litton Sys., Inc.*, 190 N.J.Super. 153 (App.Div. 1983); *Finlay & Assocs.* v. *Borg-Warner Corp.*, 146 N.J.Super. 210 (Law Div. 1976), *aff'd*, 155 N.J.Super. 331 (App.Div.), *certif. denied*, 77 N.J. 467 (1978); *Business Incentives* v. *Sony Corp. of Am.*, 397 F.Supp. 63 (S.D.N.Y. 1975)). The Chancery Division then cited the following facts which apparently led it to find ISI had been granted a license: (1) ISI was given permission to use the CCC name, trademark and logo; (2) ISI was required to promote CCC products at its own expense; (3) ISI was prohibited from selling competitive goods, (4) ISI was required to train and instruct the purchasers of CCC products; (5) ISI was required to respond to customer operational

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[22](...continued)

particularized to the facts of this case, you may have some problems as vis-a-vis the remand from me.

* * *

I don't think there was anything that was ever said to suggest that Judge Dwyer would make rulings that would be res judicata or collateral estoppel in the nature of this case.

Transcript of Proceedings, 9 November 1989, at 10, 11.

or use problems; (6) ISI received annual license fees paid by CCC customers to ISI each year the CCC system was in place, a portion of which ISI then paid to CCC; and (7) CCC exercised supervision over ISI. Ch.Div. Tr. at 53-55.

After discussing the facts, the Chancery Division generally defined "license" as being

> broader than a simple common law contract to use the trade name and mark. Without attempting to write a scholar's definition of the meaning, this Court concludes that in any given situation the meaning has to be considered in light of the Federal cases construing the Federal statutes.... [T]hat body of law is relevant in determining whether a license exists and what the duties of the respective parties are under the agreement comes in to bear and has to take account what the respective responsibilities under these laws are in respect to those activities.

Ch.Div. Tr. at 56.

The court then went on to determine that ISI and CCC had a community of interest. It stated that the "community of interest" element was what converted a licensor/licensee relationship into one warranting protection under the Franchise Practices Act. *See* Ch.Div. Tr. at 45-53.

The court found the circumstances of the relationship between ISI and CCC warranted the application of the Franchise Practices Act because "[t]ermination [of the 1984 Agreement] can benefit CCC to ... its advantage greater than any freedom to re-enter the field of competition that ISI could get." Ch.Div. Tr. at 71-72. Specifically, the court made reference to the following facts:

[I]n looking at the community of interest, [and] the concept of mutual dependence, one has to look not only at the ongoing relationships ... but where the license will be, if the conditions for termination are not satisfied and, in this case, at least since 1980, ISI has been [ ] practically prohibited from engaging in any other activity except the sale of CCC products. That certainly makes it dependent upon CCC. It has been required to devote full time and energy to the sale and promotion not only of product, but of the name and of the good will of CCC. It has had to gear, pursuant to contractual provisions, at least as now tendered, that its own products would have to be ... at least consistent or somehow configured so that it would only work with CCC products.

[I]f there is termination, all existing license agreements, maintenance contracts will be shifted automatically, the unpaid balances, without compensation to CCC, that certainly leaves an entity such as ISI that has been compelled to engage exclusively in the promotion of the CCC products, and the CCC name since 1980 in a position where it would be literally free to start from ground zero, from the field of competition, that the good will that has been built in the service area, the contacts made in the install base would be totally in the control, and again, without compensation [to] ISI, but totally for CCC.

* * *

The Court finds that the ISI/CCC relationship is not one where the product is dropped off at the customer's door and there is no further ongoing relationship. As outlined above, it is expected to be and required to be ongoing, particularly on the part of ISI, but at ISI's expense and to promote the reputation and good will of CCC.

Ch.Div. Tr. at 67-70.

The Chancery Division also looked at the extraterritorial impact of the Franchise Practices Act and determined as follows:

> All New Jersey regulates, all that it is interested in regulating is solely those relationships that fit within what the Legislature has prescribed. That's all that it has to do in order to protect that group that it seeks to protect and regulate. Those who have a contact in New Jersey, the wrongful termination of which will recognize some harm[ ].... and that impact will be in New Jersey and it will have an adverse effect in New Jersey.

Ch.Div. Tr. at 74-75. The Chancery Division went on to state that the legislature "was not concerned with extraterritorial effect" and was not seeking to give its laws extraterritorial effect. *Id.* at 75. In addition, the court stated: "[T]o the extent that the laws of those other states have a material interest in this relationship in any way [that] is inconsistent with [the Franchise Practices Act], the laws of those other states ... will apply." *Id.*

b. The Appellate Division

CCC appealed the Chancery Division decision to the Appellate Division of the Superior Court on 13 November 1989. CCC's Notice of Appeal, dated 13 November 1989, attached as Exhibit 17 to ISI Vol.II. On appeal, CCC argued the Chancery Division had committed the following errors: (1) decided issues which were outside the scope of the Remand Order,[29] (2) applied

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[29] CCC argued the district court only remanded the following issues to the state courts: (1) whether the Franchise Practices Act had extraterritorial reach beyond (continued...)

the Franchise Practices Act despite the fact that California, not New Jersey, law applies and the Franchise Practices Act does not apply to out of state franchise operations and (3) determined that the 1984 Agreement was a franchise agreement despite the fact CCC never obligated ISI to maintain a "place of business" in New Jersey and ISI did not maintain a "place of business" in New Jersey, ISI was never granted a license and there was no

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[29](...continued)
the state of New Jersey and (2) the definition of the terms "community of interest," "license" and "place of business" as used in the Franchise Practices Act. Brief on Behalf of Appellant, dated 2 January 1990 (the "CCC App.Div. Brief"), attached as Exhibit 14 to the CCC Exhibits, at 7. CCC asserted that the district court had "retained jurisdiction over the matter and the parties, including the power to apply the law, as determined by the New Jersey courts, to the facts of the case; to rule on any constitutional challenges to the [Franchise Practices] Act; and to rule on any applications for injunctive or other interim relief." *Id.*

ISI countered that the issues decided by the Chancery Division were properly before it. *See* Responding Brief and Appendix on Behalf of Plaintiff-Respondent Instructional Systems, Inc. (the "ISI App.Div. Brief"), attached as Exhibit 32 to ISI Vol.III, at 17-20. First, ISI argued that the New Jersey Constitution gave the Chancery Division jurisdiction to hear the issues raised by the Second Complaint. *Id.* at 17. Second, ISI contended CCC had waived any right it had to return to Federal court by submitting the issues to the Chancery Division for a determination in its favor. *Id.* at 18. Third, ISI asserted that if CCC were correct in its argument that the state court was prohibited from any fact-finding, the Chancery Division decision would constitute an advisory opinion "devoid of any factual background." *Id.* at 19. ISI then argued the New Jersey state courts are prohibited from issuing advisory opinions. *Id.* (citing *New Jersey Ass'n for Retarded Citizens, Inc.* v. *New Jersey Dep't of Human Servs.*, 89 N.J. 234, 241 (1982)).

In *dictum* and without explanation, the Appellate Division stated that CCC's argument that the Chancery Division had "overstepped the limits of its jurisdiction by deciding issues that the District Court's abstention order did not explicitly authorize it to decide," was "without merit." *Id.* at 58.

community of interest between ISI and CCC. *See* CCC App.Div. Brief.

The Appellate Division reversed the decision of the Chancery Division. *See Instructional Systems. Inc.* v. *Computer Curriculum Corp.*, 243 N.J.Super. 53, 62 (App.Div. 1990) ("*App. Div. Instructional Systems*"). The Appellate Division held ISI could not be a franchisee because CCC had not granted ISI a "license" as that term is used within the Franchise Practices Act. *Id.* at 58-62. Specifically, the court stated:

> [N]one of the activities which ISI actually engages in would allow a customer to conclude that there is a special connection between CCC and ISI of the type found in genuine franchise arrangements. While ISI refers to CCC in its advertising and promotional literature, it does not use CCC's name as its own. Furthermore, there are no signs or other types of advertising outside of ISI's place of business that mention CCC. These facts suggest that ISI is merely an independent contractor that happens to sell CCC products.

Id. at 61. Accordingly, the Appellate Division found that, in the absence of a "license," the relationship between CCC and ISI could not be considered a franchise within the meaning of the Franchise Practices Act. *Id.* Because the court determined that ISI's and CCC's relationship did not fall under the Franchise Practices Act, the court

> decline[d] to consider whether the [Franchise Practices] Act, if it were applicable to the relationship between CCC and ISI, could have been applied extraterritorially.

Id. at 61-62.

c. The New Jersey Supreme Court

Following the Appellate Division decision, ISI appealed to the New Jersey Supreme Court. ISI argued the Appellate Division's reversal of the Chancery Court's decision was erroneous for the following reasons: (1) the holding frustrated the purpose of the Franchise Practices Act by too narrowly construing the word "license"; (2) the decision did not follow the previous Appellate Division decision in *Neptune T.V.*, 190 N.J.Super. 153; and (3) the Appellate Division erroneously considered factors other than the 1984 Agreement in determining whether ISI was a franchise. Brief and Appendix of Plaintiff-Petitioner, attached as Exhibit 38 to ISI Vol.III.

In *Instructional Systems. Inc.* v. *Computer Curriculum Corp.*, 130 N.J. 324 (1992) ("*N.J. Sup. Ct. Instructional Systems*"), it appears the New Jersey Supreme Court reached a decision on the remanded issues as well as issues which were not remanded.

The New Jersey Supreme Court stated that it had before it the following questions:

> (1) What is a franchise under the New Jersey Franchise Practices Act; *id.* at 338
>
> (2) Does the [Franchise Practices Act] apply at all in view of the parties having chosen California law to govern the interpretation of their contract; *id.* at 341
>
> (3) What is the appropriate standard of review; *id.* at 346
>
> (4) Does the business relationship between CCC and ISI constitute a franchise protected under the New Jersey Franchise Practices Act; *id.* at 347

(a) Did the 1984 Reseller Agreement contemplate that ISI would maintain a place of business in New Jersey; *id.*

(b) Does the record support the trial court's finding that ISI has been granted a "license"; *id.* at 351

(5) If there is a New Jersey franchise, does the Act have extraterritorial reach to the franchise activities in states other than New Jersey.[21/] *Id.* at 356

[21/] Again, it appears the state court decided issues beyond those remanded. The Remand Order, as modified by the 28 July 1989 Tr., sent only the following issues to the state courts:

(1) Whether the Franchise Practices Act has extraterritorial reach beyond the State of New Jersey and, if so, to what extent;

(2) what is the definition and standard of "license" under the Franchise Practices Act;

(3) whether there is a "community of interest" between ISI and CCC; and

(4) whether ISI has a "place of business" within the meaning of the Franchise Practices Act.

See Remand Order at 1-2; 28 July 1989 Tr. at 4. No other issues were remanded to the state courts. The New Jersey courts were not asked to define "franchise" or determine the choice of law question. It further appears that the issues of whether the relationship between ISI and CCC is a franchise and the appropriate standard under which that determination should be made were inappropriately addressed.

The same observation is made concerning the Commerce Clause issue.

The New Jersey Supreme Court began by defining the term "franchise" under the Franchise Practices Act stating:

> Although franchise arrangements take many different forms, "'in its simplest form, franchising involves a company with a product or service which arranges for a group of dealers to handle its distribution. The company with the product, product line or service is known as the franchisor, and the dealers who acquire the right to sell the product or service exclusively are known as franchisees.'"

Id. at 338 (citations omitted). The court also cited the Federal Trade Commission definition of a franchise:

> "[A]ny continuing commercial relationship *** whereby a person (hereinafter 'franchisee') offers, sells, or distributes *** goods, commodities, or services which are: (1) identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter 'franchisor')." The FTC definition requires further that the "franchisor exert[] or [have] authority to exert a significant degree of control over the franchisee's method of operation."

N.J. Sup. Ct. Instructional Systems, 130 N.J. at 339-40 (quoting 1 Gladys Glickman, *Franchising* § 2.01 at 2-3 (1969)).

The court next determined that the trial court did not err by applying New Jersey law, despite the terms of the 1984 Agreement providing that California law would govern.[22] *Id.* at 341-46. The

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[22] The choice of law issue was not remanded to the state courts in the Remand Order. The issue of whether New Jersey law applies, in the event the Franchise (continued...)

court reasoned that New Jersey had a strong interest in protecting its franchisees. *Id.* at 345. In particular, the court found that the following factors illustrated New Jersey's "strong interest": the "franchise" was located in New Jersey; the majority of ISI employees resided in New Jersey; and the "franchise-specific investments" related to assets located in New Jersey. *Id.* at 345-46.

The New Jersey Supreme Court then determined the relationship between ISI and CCC contained the necessary elements to constitute a franchise within the meaning of the Franchise Practices Act.[22/] First, the court determined the Hackensack Facility "could be found to constitute a 'place of business' under the [Franchise Practices] Act." *Id.* at 351. The court determined that the "place of business" requirement could be satisfied under the Franchise Practices Act if "the contract required a place of business in New Jersey or [if] the parties reasonably anticipated that the franchise would establish a New Jersey place of business." *Id.* at 348. The court then held "[t]here was sufficient evidence to support a finding of fact that the 1984 Agreement 'contemplated' that ISI would have a 'fixed business location' in New Jersey." *Id.* at 348-51.

The court next turned to the issue upon which the Appellate Division reversed the trial court—whether ISI had been granted a license. The court compared the following facts to those in the case of *Neptune T.V.*, 190 N.J.Super 153:

22/(...continued)
Practices Act is applicable, however, was raised by CCC without reservation and appears to have been fully litigated in the state courts.

22/ The issue whether the relationship between CCC and ISI constitutes a franchise within the meaning of the Franchise Practices Act was not remanded to the state courts in the Remand Order.

> ISI has established a relationship with CCC that is quite different from that of a department store that sells Apple or IBM computers. Section 6.02 of the 1984 [Agreement] *required* ISI to "*use its best efforts* to maintain and *promote* CCC's name, trademark and logo on the [p]roducts." The CCC computerized-educational-learning system is not an "off-the-shelf" product that can be purchased at the neighborhood appliance store. Rather it is a unique combination of hardware and software whose identity is integrally related with that of ISI. Significantly, the 1984 [Agreement] prohibited ISI from selling *any products* competitive with CCC products. Moreover, CCC prohibited ISI from developing or designing any products that might compete with CCC's products. Furthermore, CCC obligated ISI to educate and train users of CCC products on a continuing basis.

N.J. Sup. Ct. Instructional Systems, 130 N.J. at 353-54 (emphasis in original).

The court then determined the relationship between CCC and ISI satisfied the requirements of *Neptune T.V.*.

> To transpose the words of *Neptune T.V.*, "We are satisfied this hallmark was present here since by [CCC's] designation of [ISI] as an [exclusive distributorship] and its [requirement]" that ISI maintain and promote CCC's name, trademark, and logo, CCC "gave its imprimatur to [ISI's] business enterprise in respect of [CCC's] product and induced the consuming public to expect from [ISI] a uniformly acceptable and quality controlled service endorsed by [CCC] itself."

N.J. Sup. Ct. Instructional Systems, 130 N.J. at 354 (quoting *Neptune T.V.*, 190 N.J.Super. at 160-61). The court concluded it "was satisfied that the trial court had sufficient evidence to find that the relationship between ISI and CCC satisfied the *Neptune T.V.* standard." *N.J. Sup. Ct. Instructional Systems*, 130 N.J. at 355. The court reached this result despite the fact ISI conducted business under its own name and did not pay a franchise fee to CCC. *Id.* at 353-55.

The New Jersey Supreme Court determined sufficient facts existed so that it could not be said "the trial court erred in finding that the CCC-ISI relationship showed a community of interest." *Id.* at 356-66. Citing *Neptune T.V.*, the court described the community of interest standard as being "based on the complex of mutual and continuing advantages which induced the franchisor to reach his ultimate consumer through entities other than his own which, although legally separate, are nevertheless economically dependent on him." *N.J. Sup. Ct. Instructional Systems*, 130 N.J. at 358 (citing *Neptune T.V.*, 190 N.J.Super. at 163). The court further explained that the "community-of-interest requirement addresses the inequality of bargaining power between the parties and is critical in distinguishing franchises from other types of businesses." *Id.* at 356. The court stated:

> The [Franchise Practices] Act's concern is that once a business has made substantial franchise-specific investments it loses all or virtually all of its original bargaining power regarding continuation of the franchise. Specifically, the franchise cannot do anything that risks termination, because that would result in a loss of much or all of the value of its franchise-related investments.

Id. at 357.

The court then reviewed the facts of this case and determined, *inter alia*, (1) ISI had made "franchise-specific investments"—such as purchasing copyrighted computer software—and (2) ISI had developed goodwill and contacts, none of which could be used if the relationship with CCC ended. *Id.* at 362-66. The court also pointed to the following facts as demonstrative of the interdependence of CCC and ISI: the requirement that ISI and its personnel direct all their energies to developing customers for CCC products, the requirement that ISI maintain training programs for CCC product users, the prohibition against ISI selling any competitive products, CCC's right to monitor ISI's books and the evidence which revealed that ISI customers considered ISI and CCC synonymous. *Id.* at 364-65.[24]

Turning to the issue of whether the Franchise Practices Act has extraterritorial reach, the New Jersey Supreme Court determined the act had, at best, only incidental extraterritorial effect. *Id.* at 370-71. The court began by recognizing two facts: (1) there was nothing to indicate CCC intended or agreed that the Franchise Practices Act would apply to CCC's activities in states other than New Jersey and (2) New Jersey has no power to regulate commerce that occurs entirely beyond its borders. *Id.* at 367 (citing *Healy* v. *Beer Institute*, 491 U.S. 324 (1989); *Edgar* v. *MITE Corp*, 457 U.S. 624 (1982)).

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[24] The court did not go on to state that the relationship between ISI and CCC actually constitutes a franchise, but in its conclusion, the court reinstated the Chancery Division decision that the relationship is a "franchise." *Id.* at 373-74.

Two dissented from the decision in *N.J. Sup. Ct. Instructional Systems* on the ground that the relationship between CCC and ISI is not a franchise within the meaning of the Franchise Practices Act. 130 N.J. at 380 (Clifford, J., and D'Annunzio, J.A.D. (temporarily assigned), dissenting).

The New Jersey Supreme Court, nevertheless, distinguished *Healy* and *Edgar* from the facts before it. The court stated:

> [I]n contrast to *Edgar*, the [Franchise Practices Act] is applicable only to specific transactions affecting New Jersey, *i.e.*, franchises that have a "place of business" in New Jersey.
>
> Were it otherwise, nearly every aspect of substantive state law would be disabled from affecting the conduct of multi-state corporations. When New Jersey imposes a legal duty on the volitional behavior of a contracting party, that ruling will often have effects beyond state boundaries.

130 N.J. at 368-69.

The New Jersey Supreme Court also briefly analyzed the question of extraterritorial reach in terms of the due-process limitations on choice of law. *Id.* at 369. In this sense, the court stated due process requires "contacts" with the forum, "interests" of the state arising out of those contacts and "fairness" to the defendant. *Id.* (citing *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, *reh'g denied*, 450 U.S. 971 (1981)). The court then found the Franchise Practices Act satisfied this test. The court further stated:

> [T]he statute's own terms ... will allow application of the [Franchise Practices] Act only in situations in which there are "contacts" with the forum, "interests" arising out of those contacts, and "fairness to the defendant" in the sense that a defendant who acts fairly with a franchise need fear no oppressive regulation. Therefore, the [Franchise] [Practices] Act's own terms curtail any impermissible extraterritorial effect and insure its constitutionality under Commerce Clause

> or due process analysis despite some incidental extraterritorial effects.

Id. at 370-71 (citations omitted).

3. Partial Summary Judgment on the Commerce Clause Argument

In *Instructional Systems II*, the CCC motion for partial summary judgment on the Commerce Clause Argument was granted. It was determined in *Instructional Systems II*, that the Franchise Practices Act, violated the Commerce Clause. Accordingly, that portion of Count One which attempted to apply the Franchise Practices Act extraterritorially was dismissed with prejudice.

On 29 June 1993, an Order was entered amending the 2 June 1993 Order (the "Amended Order"). The Amended Order did not alter the granting of CCC's summary judgment motion or the dismissal of a portion of Count One.[24]

On 2 July 1993, ISI filed a Notice of Appeal pursuant to 28 U.S.C. § 1292(a) (the "Notice of Appeal") from the 2 June 1993 Order and the Amended Order.[25]

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[24] The Amended Order clarified that the grant of partial summary judgment on Count One affected only the extraterritorial application of the Franchise Practices Act and left standing for later resolution, that portion of Count One which sought to apply the Franchise Practices Act to the parties' relationship within the state of New Jersey.

[25] Prior to filing the Notice of Appeal, ISI moved on 16 June 1993 to certify the 2 June 1993 Order for immediate appeal to the Third Circuit pursuant to 28 U.S.C. § 1292(b). The New Jersey Attorney General, who intervened in the (continued...)

Discussion

A. Jurisdiction Pending Appeal

Section 1292(a)(1) provides that United States Courts of Appeal have jurisdiction over appeals from interlocutory orders which grant, continue, modify, refuse or dissolve injunctions. 28 U.S.C. § 1292(a). The pending ISI appeal is based on its contention that the decision in *Instructional Systems II*, which granted partial summary judgment for CCC as to Count One, denied ISI's request for injunctive relief. While the Complaint requests injunctive relief for each count, such relief was not part of the opinion in *Instructional Systems II* or part of the motion which gave rise to the opinion. Succinctly stated, that decision neither granted nor denied the injunctive relief sought in the Complaint. *See Santana Prods., Inc.* v. *Compression Polymers, Inc.*, ___ F.3d ___, No. 93-7099, slip op. at 4-6 (3d Cir. 29 Oct. 1993).[27] The Amended Order dismissed that portion of Count

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[26](...continued)
earlier summary judgment motion, also moved for immediate appeal pursuant to 28 U.S.C. § 1292(b) or, alternatively, pursuant to Fed. R. Civ. P. 54(b). Initially, in an Order filed 22 July 1993, this court found both the 1292(b) and Rule 54 requests for certification and entry of final judgment were not within its jurisdiction because of the pending section 1292(a) appeal. The Third Circuit, however, remanded the certification issue to be considered "free of ... concern as to jurisdictional restraint by reason of the interlocutory appeal." Order of the Third Circuit, dated 20 September 1993. On remand, the requests of both ISI and the New Jersey Attorney General for immediate appeal were denied. *See Instructional Systems, Inc.* v. *Computer Curriculum Corp.*, ___ F.Supp. ___ (D.N.J. 5 Oct. 1993).

[27] In *Santana Products*, the Third Circuit dismissed an appeal filed pursuant to section 1292(a)(1) because jurisdiction was lacking. There the plaintiff moved for summary judgment on only one count of its five-count complaint. The summary (continued...)

One which sought to apply the Franchise Practices Act to transactions wholly outside the state of New Jersey. The summary judgment motion presently before the court, moreover, involves claims which were not addressed in *Instructional Systems II*.

In general, once an appeal has been taken, a trial court may not "'finally adjudicate substantial rights involved in the appeal.'" *Burns* v. *County of Cambria*, 788 F.Supp. 868, 869 (W.D.Pa. 1991) (quoting *Newton* v. *Consol. Gas Co.*, 258 U.S. 165, 177 (1922)). However, when the issues before the district court are not the subject of the matter on appeal, the district court maintains jurisdiction to hear and decide those unaffected issues.

> [A]n appeal from an interlocutory order does not stay the proceedings, as it is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case

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[27](...continued)
judgment motion involved the count which sought cancellation of a trademark registration; an injunction was not sought. The order granting partial summary judgment did not include any injunctive relief. The appeal followed.

In determining that it had no jurisdiction over the appeal, the Circuit found that the order was not an injunctive order. The Third Circuit described the three-part test for determining whether an order is injunctive as follows:

> "'Orders that are directed to a party, enforceable by contempt, *and* designed to accord or protect "some or all of the substantive relief sought by a complaint" in more than a [temporary] fashion.'"

Id., slip op. at 5 (emphasis in original) (quoting *Cohen* v. *Board of Trustees of University of Medicine & Dentistry*, 867 F.2d 1455, 1465 n.9 (3d Cir. 1989) (citation omitted)). The Circuit then found that the order did not satisfy the three-part test because the order "[was] not enforceable by contempt...." Slip op. at 5-6.

Plotkin v. *Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) (citing *Ex Parte National Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906)); *see Railway Labor Executives' Ass'n* v. *Galveston*, 898 F.2d 481, 481 (5th Cir. 1990); *Britton* v. *Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990); *New York State Org. of Women* v. *Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989); *West Publishing Co.* v. *Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986); *Taylor* v. *Sterrett*, 640 F.2d 663, 667-68 (5th Cir. 1981), *cert. denied*, 479 U.S. 1070 (1987); *United States* v. *Chicago*, 534 F.2d 708, 711 (7th Cir. 1976); *Silberman* v. *Bogle*, 486 F.Supp. 70, 72, 73 (E.D.Pa. 1980).[2/]

B. The Effect of the New Jersey State Courts' Decisions

Throughout the ISI opposition to CCC's summary judgment motion, ISI asserts this court is bound by the decision of the New Jersey Supreme Court in *N.J. Sup. Ct. Instructional Systems*. *See*, *e.g.*, ISI Opposition Brief at 10, 12-13, 15-18, 22; ISI

[2/] All but one of the cases cited by ISI to the contrary involve an appeal from a final decision. *See* ISI Opposition Brief at 8 (citing *Henry* v. *Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986); *SEC* v. *Investors Sec. Corp.*, 560 F.2d 561 (3d Cir. 1977); *Halderman* v. *Pennhurst State Sch. and Hosp.*, 452 F.Supp. 867 (E.D.Pa. 1978), *aff'd*, 612 F.2d 131 (3d Cir. 1979)).

The one exception is *Dayton Independent School District* v. *United States Mineral Products Co.*, 906 F.2d 1059 (5th Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 15, 956 (5th Cir. 1990), ISI Opposition Brief at 8, and that case is distinguishable from the instant case. In *Dayton*, the Court of Appeals held that the district court lacked jurisdiction to grant the plaintiff leave to amend its complaint in such a way as to render moot the issue on appeal. The Fifth Circuit stated that the trial court did not have jurisdiction to grant the plaintiff's leave to amend the complaint because "[a] district court does not have the power to 'alter the status of the case as it rests before the Court of Appeals.'" *Id.* The current summary judgment motion involves issues which are not before the Third Circuit and, therefore, do not threaten to "alter the status" of the pending appeal.

Supplemental Brief at 13. Particularly, ISI argues preclusive effect should be given to certain statements by the New Jersey Supreme Court regarding the extraterritorial application of the Franchise Practices Act[39] and the determination that ISI is a franchise under the act. This argument is rejected.

Generally, when a Federal court is presented with claims previously adjudicated in a state court between the same parties on the same facts, the Federal court must consult state preclusion law to see what effect the state court would give to the prior action.[40] *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982); *see Parsons Steel. Inc.* v. *First Alabama Bank*, 474 U.S. 518, 523 (1986). This response is required by the Full Faith and Credit Clause of the Constitution. U.S. Const. art. IV, § 1; *see* 28 U.S.C. § 1738. Section 1738 states:

> Such Acts, records or judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions from which they are take.

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[39] The issue of the constitutionality of the Franchise Practices Act, as the Act is sought to be applied in this case, has no bearing on the present summary judgment motion. That issue was previously litigated, and the extraterritorial application of the Franchise Practices Act was found to violate the Commerce Clause. This summary judgment motion addresses only those claims raised in the Complaint which were not decided on the previous summary judgment motion. Those claims, for the most part, involve common law principles and are not governed by the Franchise Practices Act. The only claim involved in the instant summary judgment motion which is governed by the Franchise Practices Act is the remaining portion of Count One seeking in-state application of the statute.

[40] Declaratory judgments are included in the category of decisions to be given preclusive effect. *See Washington* v. *Gould*, 39 N.J. 527, 533 (1963). Otherwise, they would be barred as being advisory opinions. *Friedland* v. *State*, 149 N.J.Super. 483 (Law Div. 1977).

18 U.S.C. § 1738. Accordingly, a state court decision is to be given the same preclusive effect by the Federal court as it would be given under state law. *See Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Bernardsville Quarry* v. *Bernardsville*, 929 F.2d 927, 929-30 (3d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 182 (1991).

In the area of abstention,[41/] however, normal principles of

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[41/] Abstention is a doctrine by which a Federal court may refrain from hearing state law issues before the state courts have had the opportunity to resolve those issues authoritatively. *See Pullman Co.*, 312 U.S. 496.

> The doctrine [of abstention] is ... a means devised to ameliorate some of the problems inevitably growing out of our unique federalism. For [F]ederal question cases, unseemly or unnecessary collision with a state is to be avoided, or at least postponed until such time as it is inescapable. Although the adjustment between the National Courts and a State takes a different turn in diversity cases, the underlying problem is essentially the same. And the impact—on local litigants and jurisprudence—is equally, if not more, awesome.

United Servs. Life Ins. Co. v. *Delaney*, 328 F.2d 483, 485-86 (5th Cir. 1964) (Brown, J. concurring) (footnotes omitted), *cert. denied sub nom.*, *Paul Revere Life Ins. Co.* v. *First Nat'l Bank*, 377 U.S. 935 (1964), *reh'g denied*, 377 U.S. 973 (1964); *see Grodes* v. *Mutual Fire, Marine & Inland Ins. Co.*, Nos. 93-1128 and 93-1129, slip op. at 4-5 (3d Cir. 21 Oct. 1993). The "'classic' case for application of the *Pullman* doctrine involves a constitutional attack on a state statute under circumstances where one possible construction of the statute would avoid or substantially alter the constitutional issue." *Frederick L.* v. *Thomas*, 578 F.2d 513, 516 (3d Cir. 1978); *see Grodes*, slip op. at 4.

Under *Pullman* abstention, the district court does not dismiss the case; "abstention 'does not ... involve the abdication of [F]ederal jurisdiction, but only the postponement of its exercise.'" *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964) (quoting *Harrison* v. *NAACP*, 360 U.S. 167, 177 (1959)). Accordingly, the proper procedure upon abstention is for the

(continued...)

preclusion are modified. In particular, when a Federal court has abstained from hearing an issue which is to be determined under state law but has reserved certain other issues, a state court decision has preclusive effect only as to those issues properly before it. "Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination." *England*, 375 U.S. at 417 & n.8;[42] *NAACP* v. *Button*, 371 U.S. 415, 427 (1963) (litigants have a right to return to Federal court after abstention); *Ivy Club*, 943 F.2d at 283 (when litigant reserves right to return to Federal court, "preclusion applies only to the state law question decided by the state court"); *Bradley*, 913 F.2d at 1071 (litigant may reserve right to have issues decided in Federal court); *Kovats*, 749 F.2d at 1047 (same); *see also Peduto*, 878 F.2d at 729 n.5.

This exception to the general principles of preclusion was articulated by the Supreme Court in *England*. In that case, plaintiff chiropractors initially sued in Federal court seeking both an

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[41](...continued)
district court to retain jurisdiction so as to be able to consider any remaining Federal issues at the end of the state courts' determination. *See Deakins* v. *Monaghan*, 484 U.S. 193, 197-98 (1988); *Allen* v. *McCurry*, 449 U.S. 90, 101 n.17 (1980); *Ivy Club* v. *Edwards*, 943 F.2d 270, 279 (3d Cir. 1991), *cert. denied sub nom.*, *Del Tufo* v. *Ivy Club*, ___ U.S. ___, 112 S.Ct. 1282 (1992); *Georevich* v. *Strauss*, 772 F.2d 1078, 1094 n.21 (3d Cir. 1985), *cert. denied*, 475 U.S. 1028 (1986).

[42] The holding in *England* remains valid. In *Bradley* v. *Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990), the Third Circuit stated that its "precedent demonstrates the continued vitality of the rule enunciated in *England*." *Id.* at 1071 (citing *Kovats* v. *Rutgers*, 749 F.2d 1041, 1046 (3d Cir. 1984); *New Jersey Educ. Ass'n* v. *Burke*, 579 F.2d 764, 772-74 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); *Peduto* v. *North Wildwood*, 878 F.2d 725, 729 n.5 (3d Cir. 1989)); *see Ivy Club*, 943 F.2d at 283; *Bernardsville Quarry*, 929 F.2d at 929.

interpretation of a state statute regulating medical licenses, and, if the statute were found to apply to them, a ruling on its constitutionality. The district court abstained and remanded the plaintiffs to state court for a determination of the state law issues. After litigating and losing both their state and Federal claims in the state courts, the plaintiffs attempted to return to the district court. The district court dismissed the plaintiffs' attempted return on the ground that their proper remedy was to appeal to the United States Supreme Court. The dismissal was upheld by the Court of Appeals; the plaintiffs sought review in the Supreme Court.

Overturning the courts below, the Supreme Court held that

> in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be deprived of that determination ... he may inform the state courts that he is exposing his [F]ederal claims there only for the purpose of complying with *Windsor*,[4] and that he intends, should the

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[4] In *Government Civic Org. Employees Comm.* v. *Windsor*, 353 U.S. 364 (1957), the plaintiff labor union sued in Federal court seeking to enjoin the enforcement of a state statute it argued was unconstitutional. The district court abstained from ruling on the issue of the statute's constitutionality in order to allow the state courts to determine whether the plaintiff constituted a labor union within the meaning of the statute. The plaintiff accordingly sought a ruling from the state court as to whether the statute was applicable to it but never raised the constitutional issues. The plaintiff feared that by raising the constitutional issues the state court could address those issues with preclusive effect. The state's highest court held that the statute was applicable, and the plaintiff returned to the district court for a determination of the constitutional question. The district court dismissed the case reasoning that it was inappropriate for it to determine the constitutional validity of the statute because the state court determination was incomplete; the state court determination had not been undertaken in light of the constitutional challenges. On appeal, the United States Supreme Court remanded

(continued...)

> state court hold against him on the question of state law, to return to the District Court for disposition of his [F]ederal contentions.

England, 375 U.S. at 421.

If this modification of the general principles of preclusion and Full Faith and Credit did not exist, *Pullman* abstention would create "a roundabout way for [the district court] to decline plaintiff's proper invocation of [F]ederal jurisdiction." *Navedo* v. *Acevedo*, 752 F.Supp. 523, 533 (D.P.R. 1990), *aff'd sub nom.*, *Granados Navedo* v. *Acevedo*, 932 F.2d 294 (1st Cir. 1991). The *England* rule is necessary because otherwise, in cases where the jurisdiction of the district court is properly invoked, the application of abstention would serve to deny a litigant his guaranteed Federal forum. This result would conflict with the duty imposed by Congress on the Federal judiciary with respect to the litigant's appropriate choice of forum. *See Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967). As the Supreme Court stated in *England*:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider [F]ederal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the [F]ederal courts, and with the

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[2](...continued)
the case to the district court and ordered it to retain jurisdiction while the plaintiff returned to the state courts for a proper determination of the state issues in light of the constitutional challenges. *Id.* at 839.

> principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction...." The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.

England, 375 U.S. at 415 (citation omitted).

> Indeed, any argument
>
> that the state court proceeding bars ... inquiry [by the district court] ignores the very concept of *Pullman* abstention which entails a [F]ederal court taking jurisdiction, staying the [F]ederal suit while the parties clarify the state issues in state court, and then restoring the action for the adjudication of [F]ederal claims if the need for such resolution survives the state judicial procedure.

Navedo, 752 F.Supp. at 533; *see England*, 375 U.S. at 417.

In the absence of a waiver, all issues reserved by the litigant for determination upon his return to Federal court, including factual issues, may be litigated in Federal court. The Supreme Court in *England* stated that the need for the reservation of issues

> is especially true as to issues of fact. Limiting the litigant to review here [the Supreme Court] would deny him the benefit of a [F]ederal trial court's role in constructing a record and making factual findings. How the facts are found will often dictate the decision of [F]ederal claims.

375 U.S. at 416. Accordingly, if factual issues necessary to the determination of the reserved issues are decided by the state courts,

such issues may be relitigated upon return to the Federal court. *See id.*

> Upon return to [F]ederal court, the [F]ederal plaintiff may fully litigate his [F]ederal claims, including the factual issues that may be identical to those underlying the state law question.

Ivy Club, 943 F.2d at 283.

The option of reserving issues for adjudication in Federal courts is available to both plaintiffs and defendants.

> The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the [F]ederal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the [F]ederal question there. Once an issue has been joined in the [F]ederal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the [F]ederal question.

England, 375 U.S. at 422 n.13.

It also appears that litigants who remove actions to Federal court based on diversity jurisdiction are equally entitled to return to the Federal forum after that court's exercise of abstention. *See* 17A Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4243 at 77 n.34 ("[r]eading the footnote [*England*, 375 U.S. at 422 n.13] as a whole, it seems clear that the Court did indeed mean that a defendant may *always* make such a reservation") (emphasis added). Accordingly, even state law issues which were properly raised in

the Federal court pursuant to diversity jurisdiction may be reserved for Federal adjudication.

In the instant case, the matter, which was originally filed in state court, was removed to this court on 6 February 1989 based on the presence of diversity jurisdiction.[4] The New Jersey state courts subsequently lost all jurisdiction over this matter upon removal. "[A]fter removal, the jurisdiction of the state court absolutely ceases." *Maseda* v. *Honda Motor Co.*, 861 F.2d 1248, 1254 (11th Cir. 1988); *see Resolution Trust Corp.* v. *Murray*, 935 F.2d 89, 92-93 (5th Cir. 1991); *Chesimard* v. *Kuhlthau*, 370 F.Supp. 473, 475 (D.N.J. 1974); 28 U.S.C. § 1446(d) ("the State shall proceed no further unless and until the case is remanded"). CCC's removal of the case to this court, moreover, established its right to have the dispute resolved in Federal court. *See England*, 375 U.S. at 422 n.13.

The way in which ISI sought to have the Franchise Practices Act applied raised the question of whether the statute violated the Commerce Clause. Preliminary to the constitutional issue, however, was the question of whether the Franchise Practices Act could be applied to the relationship between ISI and CCC. In the absence of any clear guidance from the New Jersey case law or the

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[4] The procedure of removal gives a defendant who has been sued in a state court of competent jurisdiction the right to substitute a Federal forum for that initially selected by the plaintiff. The removal statute arose out of the same fear of local prejudices which led to diversity jurisdiction.

> [T]he very object of giving to the national courts jurisdiction ... in controversies between citizens of different states was to institute independent tribunals which ... would be unaffected by local prejudices and sectional views....

Burgess v. *Seligman*, 107 U.S. 20, 34 (1883).

legislative history of the Franchise Practices Act, the motion for abstention was granted to "afford[] the courts of New Jersey a fair opportunity to provide a definitive interpretation of the Franchise Practices Act." *Instructional Systems I*, slip op. at 13.

As mentioned, the following issues were remanded to the New Jersey state courts: (1) Whether the Franchise Practices Act has extraterritorial reach beyond the State of New Jersey and, if so, to what extent, (2) whether there is a "community of interest" between ISI and CCC and (3) whether ISI has a "place of business" within the meaning of the Franchise Practices Act. Remand Order at 1; 28 July 1989 Tr. at 4. Excluded from the Remand Order were issues concerning any constitutional challenge to the Franchise Practices Act.[4/] Remand Order at 2. This court also retained jurisdiction over all other issues which were not remanded including "the application of the principles of law determined by the state court to the facts of this case" and Counts Two through Seven. Remand Order at 2.

By virtue of its right to have the dispute litigated in Federal court, CCC had a corresponding right to return to Federal court after abstention to have the issues it reserved heard. *See England*, 375 U.S. at 422 n.13 ("the defendant ... by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate" in Federal court). Upon abstention that right would be involuntarily lost to CCC if it were not allowed the option of returning to this court for Federal adjudication of the issues which it reserved and from which this court did not abstain.

[4/] ISI conceded CCC properly reserved its right to a determination of the Commerce Clause Argument by a Federal Court. *See* Letter from ISI, addressed to the court, dated 11 November 1992 (the "ISI 11 Nov. 1992 Letter"), at 2. There is no indication in the record that CCC subsequently waived its right to a Federal adjudication of the Commerce Clause Argument.

State courts may not ignore the fact that a Federal court remanded only a limited scope and number of issues and reserved jurisdiction to itself for the remainder. The Third Circuit has cautioned that Federal courts must be particularly careful not to deprive litigants of their right to a Federal adjudication of reserved issues where the state court has "resolve[d] issues beyond those which the [F]ederal court abstained." *Kovats*, 749 F.2d at 1047. The proper method of dealing with a state court decision which goes beyond the boundaries of the remand order is to limit the preclusive effect given to the state court determination. *See England*, 375 U.S. at 415; *Kovats*, 749 F.2d at 1047; *see also Navedo*, 752 F.Supp. at 533.

It appears CCC took the proper steps to reserve its right to have determined in Federal court the question of the constitutional validity of the Franchise Practices Act under the Commerce Clause as well as the application of the statute to its relationship with ISI. *See* CCC Ch.Div. Brief, at 1470a-71a. CCC's right to have the reserved issues adjudicated by a Federal court could only be waived by it; there is no indication in the record that CCC waived its right to a Federal adjudication of the reserved issues in this case. Accordingly, to the extent the New Jersey state courts went beyond the boundaries of the Remand Order, as modified, and decided issues reserved for adjudication in Federal court, such decisions are not entitled to preclusive effect in this court.

C. Summary Judgment Standard of Review

To prevail on a motion for summary judgment, the moving party must establish "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The present task is to determine whether disputed issues of fact exist, but a district court may not resolve factual disputes in a motion for summary judgment. *Anderson* v. *Liberty*

Lobby Inc., 477 U.S. 242, 249-50 (1986); *see also Desvi, Inc.* v. *Continental Ins. Co.*, 968 F.2d 307, 308 (3d Cir. 1992) ("threshold inquiry is whether there are 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party'") (citations omitted); *Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992) ("We apply the test ... (1) Is there no genuine issue of material fact and (2) is one party entitled to judgment as a matter of law?") (quotations omitted); *Hackman* v. *Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991) ("summary judgment is inappropriate when a conflict of a material fact is present in the record"); *Nathanson* v. *Medical College of Pa.*, 926 F.2d 1368, 1380 (3d Cir. 1991) (summary judgment may not be granted "if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed").

All evidence submitted must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Williams* v. *New Castle County*, 970 F.2d 1260, 1264 (3d Cir. 1992); *Boyle* v. *Governor's Veterans Outreach & Assistance Center*, 925 F.2d 71, 75 (3d Cir. 1991); *Weldon* v. *Kraft, Inc.*, 896 F.2d 793, 797 (3d Cir. 1990); *Todaro* v. *Bowman*, 872 F.2d 43, 46 (3d Cir. 1989). "Any 'unexplained gaps' in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment." *Ingersoll-Rand Fin. Corp.* v. *Anderson*, 921 F.2d 497, 502 (3d Cir. 1990) (quoting *O'Donnell* v. *United States*, 891 F.2d 1079, 1082 (3d Cir. 1989)).

Although the summary judgment hurdle is a difficult one to overcome, it is by no means insurmountable. As the Supreme Court has stated, once the party seeking summary judgment has

pointed out to the court the absence of a genuine issue of material fact,

> its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with "*specific facts* showing that there is a *genuine issue for trial*." Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

Matsushita, 475 U.S. at 586-87 (emphasis in original, citations and footnotes omitted). In other words, the inquiry involves determining "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Brown* v. *Grabowski*, 922 F.2d 1097, 1111 (3d Cir. 1990) (quoting *Anderson*, 477 U.S. at 251-52), *cert. denied sub nom.*, *Roselle* v. *Brown*, 111 S.Ct. 2827 (1991); *see also Gray*, 957 F.2d at 1078 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party").

The Supreme Court elaborated on the summary judgment standard in *Anderson*: "If the evidence [submitted by a party opposing summary judgment] is merely colorable, or is not significantly probative, summary judgment may be granted." 477 U.S. at 249-50 (citations omitted). The Supreme Court went on to note in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986): "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Id.* at 323-24 (footnote omitted); *see also Carlson* v. *Arnot-Ogden Memorial Hosp.*, 918 F.2d 411, 413 (3d Cir.

1990) ("nonmoving party must adduce more than a mere scintilla of evidence in its favor"); *Maguire* v. *Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990) (non-moving party may not rest upon mere allegations); *Schoch* v. *First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990) (neither unsupported allegations in pleadings and memoranda of law nor conclusory allegations in affidavits will establish genuine issue of material fact); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1165 (3d Cir. 1990) (cannot create issue of fact merely by questioning credibility of movant's witnesses; circumstantial evidence may raise issue of fact); *Aronow Roofing Co.* v. *Gilbane Bldg. Co.*, 902 F.2d 1127, 1128 (3d Cir. 1990) ("summary judgment will be granted where the non-moving party fails to 'establish the existence' of an element essential to the case").

D. Summary Judgment as to the Remainder of Count One[46]

1. Failure to Renew the 1984 Agreement

Section 10-5 of the Franchise Practices Act, N.J.S.A. § 56:10-5, sets forth exacting requirements for the termination of a franchise defined under the act. Section 10-5 provides in pertinent part:

> It shall be a violation of this act for any franchisor directly or indirectly through any officer, agent, or employee to terminate, cancel or fail to renew a franchise without having first given written notice setting forth all the reasons for such termination, cancellation, or intent not to renew to the

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[46] For purposes of this discussion, it is assumed ISI is a franchise within the meaning of the Franchise Practices Act to the extent of the act's application within the state of New Jersey.

> franchisee at least 60 days in advance of such termination, cancellation, or failure to renew.... It shall [also] be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.

N.J.S.A. § 56:10-5. As the Third Circuit has stated, this section of the Franchise Practices Act creates "an exception to the general rule that two businesses are free to terminate their business relationship according to the terms of their contract." *New Jersey Am., Inc.* v. *Allied Corp.*, 875 F.2d 58, 61 (3d Cir. 1989).

ISI argues that the refusal of CCC in 1989 to renew each term of the 1984 Agreement constitutes a constructive non-renewal in violation of the Franchise Practices Act. ISI Opposition Brief at 31-32. It is undisputed that the 1989 Agreement continued the exclusive distributorship for ISI in New Jersey. ISI contends, however, the continuation of the parties' relationship in New Jersey through the 1989 Agreement does not immunize CCC from liability under the Franchise Practices Act. ISI Opposition Brief at 32.

ISI cites the following modifications imposed by the 1989 Agreement, as constituting constructive termination: the reduction of the Marketing Territory,[47] the requirement of a personal guaranty from Kaminer, the restrictions on Kaminer's permitted

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[47] The elimination of the Eight States from the Marketing Territory cannot be interpreted as a violation of the Franchise Practices Act. *Instructional Systems II* held the application of the Franchise Practices Act outside of New Jersey violates the Commerce Clause.

activities and the elimination of ISI's "most favored nation rights" in all present and future pricing. ISI Opposition Brief at 34 & n.9.

ISI's argument that there has been a constructive non-renewal is not persuasive because its exclusive distributorship of CCC products continues in New Jersey, the only state governed by the Franchise Practices Act. *See Wisconsin Music Network, Inc.* v. *Musak Ltd. Partnership*, 822 F.Supp. 1332, 1336 (E.D.Wis. 1992) ("the proposition that the offer of a new contract with different terms amount to a termination ... 'is nonsense'"), *aff'd*, 1993 U.S. App. LEXIS 23,742 (7th Cir. 1993).

If ISI had refused to sign the 1989 Agreement on the basis that the new provisions were unreasonable and unbearable, thereby terminating its distributorship in New Jersey, it may well have been in a position to argue there had been a constructive non-renewal. *See Carlo C. Gelardi Corp.* v. *Miller Brewing Co.*, 502 F.Supp. 637, 652-53 (D.N.J. 1980) (addressing question of whether franchisor's actions had "forced" franchisee to quit distributorship in violation of section 10-5). In addition, if CCC had terminated or attempted to terminate ISI's distributorship in New Jersey based on ISI's failure to comply with an unreasonable provision added by the 1989 Agreement, ISI may well have been in a position to challenge such action as a violation of section 10-5.

Until there has been a termination or at least threatened termination of ISI's distributorship in New Jersey, there is no basis for finding a violation of section 10-5. ISI's recourse for any unreasonable standards allegedly imposed by the 1989 Agreement is resort to section 10-7(e) which prohibits unreasonable standards of performance, otherwise section 10-7(e) would be rendered superfluous.

Because there is no genuine issue of material fact, summary judgment is appropriate as to that portion of Count One which alleges a violation of section 10-5.

2. Unreasonable Standards of Performance

ISI argues that certain changes imposed by the 1989 Agreement constitutes "unreasonable standards of performance" in violation of section 10-7 of the Franchise Practices Act. ISI Opposition Brief at 35; Complaint, ¶ 42. Section 10-7 provides in pertinent part:

> It shall be a violation of th[e Franchise Practices] Act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices:
> ...
> (e) To impose unreasonable standards of performance upon a franchisee.

N.J.S.A. § 56:10-7(e).

ISI states that the new sales and discount quotas in the 1989 Agreement, "when combined with ISI's loss of territory and loss of exclusivity in marketing hardware and software, were not reasonable." ISI Opposition Brief at 36-37. As support ISI refers to the certification of its expert, Peter Max, *id.* at 37, which states:

> The future sales and discount quotas CCC has set for ISI do not adequately reflect either these changes in territory [the limitation of the Marketing Territory to the Three State Marketing Territory] or other material changes in the manner in which ISI is allowed to compete and in the competitive environment. Under the terms of the proposed contract, ISI

> is severely limited in its ability to penetrate further those markets it retains.

Certification of Peter Max, dated 13 July 1989, attached as Exhibit C to the Eakeley Certif. (the "Max Certif."), at ¶ 18.

CCC argues, however, that the 1989 Agreement did not impose any unreasonable standards on the performance of ISI. CCC Moving Brief at 13. In support of that argument, CCC states that ISI met the discount and termination quotas for 1989 and 1990. *Id.* ISI does not dispute this but argues that the fact it was able to meet the quotas is not an accurate indication of the reasonableness of those quotas because it had to struggle to meet them. ISI Opposition Brief at 37.

Whether the changes imposed by the 1989 Agreement, including the elimination of the Eight States, were reasonable under section 10-7(e) is a fact intensive issue. When all factual inferences are drawn in favor of ISI, it cannot be said that there are no genuine issues of material fact as to whether the changes were reasonable under section 10-7(e). Contrary to the CCC argument that ISI has submitted only conclusory statements in opposition to its argument that the terms of the 1989 Agreement were reasonable, ISI has submitted an expert affidavit of the unreasonableness of the changes. *See* Max Certif. The affidavit raises genuine issues of material fact which preclude summary judgment on the portion of Count One which alleges a violation of section 10-7(e).

E. Summary Judgment as to the Common Law Causes of Action

This summary judgment motion also involves the remaining counts in the Complaint—Counts Two through Seven—which

concern allegations of breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference with prospective economic relationships, unfair competition, unjust enrichment and breach of fiduciary duty.

1. Choice of Law Question

Generally, in a diversity action a Federal court is obliged to apply the substantive law of the state in which the forum is located. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Lacey* v. *Cessna Aircraft Co.*, 932 F.2d 170, 187 (3d Cir.), *reh'g denied en banc*, 1991 U.S. App. LEXIS 22,458 (3d Cir. 1991); *Shuder* v. *McDonald's Corp.*, 859 F.2d 266, 269 (3d Cir. 1988); *Pancza* v. *Remco Baby, Inc.*, 761 F.Supp. 1164, 1168 (D.N.J. 1991); *Hoffman Equip., Inc.* v. *Clark Equip. Co.*, 750 F.Supp. 1222, 1229 (D.N.J. 1990), *aff'd mem.*, 935 F.2d 1281 (3d Cir. 1991).

In contractual disputes, New Jersey follows the Restatement (Second) of Conflict of Laws § 188 (1971) (the "Restatement") to determine which state's law governs. *State Farm Mut. Auto. Ins. Co.* v. *Estate of Simmons*, 84 N.J. 28, 34 (1980); *Pancza*, 761 F.Supp. at 1168. The Restatement standard, known as the "most significant relationship" test focuses on the state which has the most significant connections with the transaction and the parties.[4] *Pancza*, 761 F.Supp. at 1168; *see Rohm & Haas Co.*, 689 F.2d at 429. Under the Restatement approach, factors involved in the significant relationship test (the domicile of the parties, the place of contracting, the place of performance and the location of the subject matter) are balanced against the reasonable expectations

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[4] The same test is used for tort cases. *See Rose* v. *Port of N.Y. Auth.*, 61 N.J. 129, 139-40 (1972); *Rohm & Haas Co.* v. *Adco Chem. Co.*, 689 F.2d 424, 429 (3d Cir. 1982).

of the contracting parties and the governmental and legislative interests of each interested state. *State Farm*, 84 N.J. at 34; *Pancza*, 761 F.Supp. at 1168.

This is predominantly a breach of contract case. The contract at issue included a choice of law provision which requires that the legal relations created by the contract be governed by the laws of California. 1984 Agreement, § 14.10. Ordinarily, when the parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts have upheld the contractual choice-of-law provision as long as that provision does not violate New Jersey's public policy. *See Winer Motors, Inc.* v. *Jaguar Rover Triumph, Inc.*, 208 N.J.Super 666, 671-72 (App.Div. 1986); *Kalman Floor Co.* v. *Joseph L. Muscarelle, Inc.*, 196 N.J.Super. 16, 21-22 (App.Div. 1984), *aff'd*, 98 N.J. 266 (1985).

ISI argues, however, that New Jersey rather than California law applies because (1) New Jersey has the most significant interest in the dispute and (2) the New Jersey state courts have previously determined New Jersey law should apply. ISI Opposition Brief at 10-13. With respect to the latter contention, ISI overlooks the fact that the New Jersey state courts' choice of law discussions concerned only Count One and centered on the involvement of the Franchise Practices Act. Specifically, the New Jersey Supreme Court reasoned:

> Despite some contrary precedent, "[m]ost courts *** have held that the parties to a franchise agreement cannot avoid the franchise law of the state in which the franchisee is located by providing in their agreement that the laws of another state will govern."

N.J. Sup.Ct. Instructional Systems, 130 N.J. at 344 (citation omitted); *see also App.Div. Instructional Systems*, 243 N.J.Super. at 57-58; Ch.Div. Tr. at 7-20, 73-74.

The analysis of the state courts as to the choice of law issue has no relevance with regard to Counts Two through Seven. The state courts dealt only with limited issues rising exclusively from Count One. Counts Two through Seven were not remanded.[22] The state courts' reasoning focused solely on the application of the

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[22] In fact, it was explicitly stated that Counts Two through Seven were *not* remanded to the state courts pursuant to the abstention doctrine.

> THE COURT: First, I want to indicate that I do not view it as an application to remand the entire case. I view it as an application to remand certain of the issues. I'm inclined to grant the remand on the issues of the [extraterritorial] application ... to states beyond New Jersey.
>
> As well, in light of the comments of Judge Becker [in *New Jersey Am.*,] with regard to the almost total absence of instruction from the New Jersey courts and absence of legislative history, with regard to what I consider to be coupled issues of community of interest, place of business, licensee.
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> These are the issues that were raised by [CCC]. It would not be my intent and, obviously, [CCC] has the ability, which I assume they will exercise, to reserve the [F]ederal issue for my determination at a later point, if that's necessary. The [F]ederal issue being whether there is a commerce clause implication here which would result in a declaration that as applied to these facts the Franchise Practices Act would be unconstitutional.
>
> It would also be my inclination to stay the remainder of the [C]omplaint, [C]ount [T]wo through [S]even, for later determination in this court.

Transcript of Proceedings, 20 July 1989 (the "20 July 1989 Transcript"), at 2-3. The Remand Order administratively stayed the issues arising from Counts Two through Seven pending determination of the remanded issues.

Franchise Practices Act. The state court analysis has no relevance in the context of the Common Law Counts.

CCC does not object, however, to the application of New Jersey law. It contends the outcome is the same under the application of the laws of either New Jersey or California. CCC Moving Brief at 6 n.8. Accordingly, for purposes of this summary Judgment motion, New Jersey law will be applied.[20]

2. Preemption

ISI repeatedly refers to the Franchise Practices Act as support for its common law causes of action. In particular, it points to various aspects of the holding in *N.J. Sup. Ct. Instructional Systems*. *See, e.g.*, ISI Opposition Brief at 7, 10-11, 14-18, 22, 25. This ISI argument inappropriately confuses ISI's claim in Count One with the claims it asserts in Counts Two through Seven.

Count One is mutually exclusive to Counts Two through Seven. If ISI were a franchisee and the Franchise Practices Act had extraterritorial application, the entire Complaint would be governed by the Franchise Practices Act. In that event, the Common Law Counts are entirely preempted and ISI would be permitted to proceed only for violations of the Franchise Practices Act. *Horn* v. *Mazda Motor of Am., Inc.*, 265 N.J.Super. 47, 53 n.2 (App.Div.) ("[a]ny common law causes of action were preempted by the Franchise Practices Act"), *certif. denied*, ___ N.J. ___ (1993); *Tynan* v. *General Motors Corp.*, 248 N.J.Super. 654, 670

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[20] When examination of the two possible choices of state law reveals that the outcome would be the same under either, "New Jersey conflicts of law rules permit the resolution of the case without a choice between the laws of the two states." *Rohm*, 689 F.2d at 429; *see Pfau* v. *Trent Aluminum Co.*, 55 N.J. 511, 527 (1970).

(App.Div. 1991) ("We recognize that the statute does not expressly provide that all common law actions stemming from the improper withholding of consent to transfer are subsumed within or preempted by the [Franchise Practices] Act. Nevertheless, we reject the contention that a common law tort survives."), *certif. denied in part rev'd in part on other grounds*, 127 N.J. 269 (1992); *see Freedman Truck Ctr., Inc.* v. *General Motors Corp.*, 784 F.Supp. 167, 178 (D.N.J. 1992) ("[T]he court finds neither mandate nor warrant for adding to the formidable protections the legislature has already afforded franchisees. Accordingly, the court will grant defendant's motion to dismiss plaintiff's claim based on alleged violations of New Jersey common law and public policy.").

If ISI is not a franchisee under the Franchise Practices Act, the act will not apply, and Count One will be dismissed. Under that scenario, Counts Two through Seven survive and the allegations in the Complaint are governed by common law principles. *Dunkin' Donuts of Am., Inc.* v. *Middletown Donut Corp.*, 100 N.J. 166, 176 (1985) (common law principles of freedom of contract applicable to franchise agreements outside the Franchise Practices Act); *cf. Elizarraras* v. *Bank of El Paso*, 631 F.2d 366, 376 (5th Cir. 1980) ("[w]here the U.C.C. does not address an issue, one should refer to the common law for guidance").

If ISI is a franchisee under the Franchise Practices Act and there is no extraterritorial application of the Franchise Practices Act, Count One, to the extent it relates to the parties' relationship in New Jersey, will be governed by the act. In such a scenario, Counts Two through Seven will survive to the extent they relate to the parties relationship outside of New Jersey. Accordingly, the following discussion as to the merits of the Common Law Counts is undertaken. *See Dunkin' Donuts*, 100 N.J. at 176.

3. Count Two—Breach of Contract

ISI alleges CCC breached the 1984 Agreement by its refusal to renew the exact terms of the agreement in 1989.[5]/ Complaint, ¶ 46. ISI's breach of contract claim is based on the argument that the Termination Provision in the 1984 Agreement is unenforceable. ISI contends CCC, therefore, breached the contract by allowing the 1984 Agreement to terminate and by entering into a new contract with different terms in 1989. ISI argues that the Termination Provision is unenforceable for essentially two reasons: (1) the Termination Provision did not effect the alleged understanding between the parties that the relationship would continue unchanged unless CCC had good cause to change it and (2) the Termination Provision was unconscionable and violated public policy. ISI Opposition Brief at 5-6, 15-18.

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[5]/ ISI also alleges in the Complaint that CCC breached the 1984 Agreement by its "refusal to provide ISI with necessary technical information with respect to the IBM-CCC hardware program." Complaint, ¶ 46. The Complaint states:

> CCC has refused to provide ISI with any necessary technical, pricing and discount information with respect to the new IBM CCC hardware program now being offered, effective January 27, 1989 for sale along with other CCC [p]roducts thereby interfering with and significantly impeding ISI's efforts to market and sell CCC [p]roducts.

Id., ¶ 40. The referenced arrangement between CCC and IBM, however, apparently did not take place until sometime well after the filing of the Complaint. *See* Excerpts from the Deposition of Suppes (the "Suppes Dep."), attached as Exhibit D to the Rosdeitcher Aff., at 12-13. As of June 1989, the arrangement was still in the negotiations' phase. *Id.* As well, ISI is silent on this issue in its Opposition Brief. It appears, therefore, this issue has been abandoned.

Under New Jersey law, the general rule governing contract disputes is:

> Basic to our free enterprise system is the right to enter or to refrain from entering or continuing a contractual relationship. Rejection of an offer, or termination of a contract in accordance with its express terms, is a right the exercise of which is unencumbered by the threat of tort liability.

Rothermel v. *International Paper Co.*, 163 N.J.Super. 235, 244 (App.Div. 1978), *certif. denied*, 79 N.J. 487 (1979); *see Dunkin' Donuts*, 100 N.J. at 176 (common law principles of freedom of contract applicable to franchise agreements outside the Franchise Practices Act); *N.J. Sup. Ct. Instructional Systems*, 130 N.J. at 339 ("[a]t common law, freedom of contract was the rule applicable to franchise agreements"); *New Jersey Am.*, 875 F.2d at 61 (the "general rule that two businesses are free to terminate their business relationship according to the terms of their contract").

a. The Termination Provision

The appropriateness of granting summary judgment on Count Two in favor of CCC depends upon whether the contract terms at issue are clear and unambiguous. *Ingersoll-Rand*, 921 F.2d at 502; *see Cury* v. *Colonial Life Ins. Co.*, 737 F.Supp. 847, 853 (E.D.Pa. 1990). The question whether a term is clear or ambiguous is a question of law. *Tigg Corp.* v. *Dow Corning Corp.*, 822 F.2d 358, 362 (3d Cir. 1987); *Hershey Foods Corp.* v. *Ralph Chapek, Inc.*, 828 F.2d 989, 995 (3d Cir. 1987); *Thermice Corp.* v. *Visitron Corp.*, 832 F.2d 248, 252 (3d Cir. 1987); *Kroblin Refrigerated XPress, Inc.* v. *Pitterich*, 805 F.2d 96, 101 (3d Cir. 1986); *Air Master Sales Co.* v. *Northbridge Park Co-op, Inc.*, 748 F.Supp. 1110, 1114 (D.N.J. 1990); *Borbely* v.

Nationwide Mut. Ins. Co., 547 F.Supp. 959, 966 (D.N.J. 1981). An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. *Mellon Bank, N.A.* v. *Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980).

Construction of a contract's terms is a question of law. *Nevets C.M., Inc.* v. *Nissho Iwai Am. Corp.*, 726 F.Supp. 525, 531 (N.J. 1989), *aff'd mem.*, 899 F.2d 1218 (3d Cir. 1990); *Vanguard Telecommunications. Inc.* v. *Southern New England Tel. Co.*, 722 F.Supp. 1166, 1178 (D.N.J. 1989), aff'd 900 F.2d 645, 651 (3d Cir. 1990); *Ram Constr. Co.* v. *American States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984). The construction of an unambiguous term in a contract is "exclusively with[] the court." *Nevets*, 726 F.Supp. at 531; *Feist & Feist Realty Corp.* v. *Dockside Urban Renewal Corp.*, 255 N.J.Super. 100, 108 (Law Div. 1992) ("[w]here the language of a writing is clear and unambiguous and there is no credible evidence which could create doubt as to the meaning, the construction and effect of the writing is a matter of law to be determined by the court").

In interpreting the contract, the subjective, undeclared, intentions of the parties are immaterial, because manifestation of intention, as reflected in the language, controls. *Armco Inc.* v. *Glenfed Fin. Corp.*, 720 F.Supp. 1129, 1138 (D.N.J. 1989). To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their "plain and ordinary meaning." *Nevets*, 726 F.Supp. at 533.

In this case, the Termination Provision stated, in relevant part: "This Agreement ... shall ... continue in effect until July 31, 1989." 1984 Agreement, § 13.01. It is clear this term provided an expiration date for the 1984 Agreement. There was nothing in

the Termination Provision which suggests the parties contracted for an extension or renewal or an option for an extension or renewal of the 1984 Agreement upon its termination.

The parties contracted for the expiration of the contract on 31 July 1989. As a matter of law, it cannot be said that the Termination Provision was ambiguous. In fact, ISI does not contend that the Termination Provision was ambiguous.[12] "[W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." *Karl's Sales & Serv., Inc.* v. *Gimbel Bros., Inc.*, 249 N.J.Super. 487, 493 (App.Div.) (citing *Kampf* v. *Franklin Life Ins. Co.*, 33 N.J. 36, 43 (1960)), *certif. denied*, 127 N.J. 548 (1991).

b. The Parol Evidence Rule

ISI claims, in spite of the Termination Provision, that it always understood the relationship between it and CCC "would not be terminated except for good cause." Complaint, ¶ 14. In support of its argument, ISI seeks to present evidence extrinsic to the 1984 Agreement. CCC argues in response that in light of the Termination Provision and Merger Clause in the 1984 Agreement, any evidence produced by ISI to demonstrate this understanding

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[12] ISI's argument that "the absence of any provision in the 1984 Agreement for orderly transfer of existing customer accounts ... reflect[s] the parties' intention that their relationship would continue indefinitely into the future," ISI Opposition Brief at 5-6, does not render the Termination Provision ambiguous. There is no term in the 1984 Agreement which can be read to suggest the parties contemplated anything other than automatic expiration of the agreement on 31 July 1989. As discussed, in determining whether a contractual provision is ambiguous, only the terms in the agreement are to be considered in the determination of whether a contractual term is ambiguous. "[M]anifestation of intention, as reflected in the language, controls." *Armco*, 720 F.Supp. at 1138.

falls outside of the 1984 Agreement and thus is barred by the parol evidence rule. Moving Brief at 6-9.

The parol evidence rule is a matter of substantive contract law, not one of evidence. *Fr. Winkler KG* v. *Stoller*, 839 F.2d 1002, 1005 (3d Cir. 1988); *Atlantic N. Airlines, Inc.* v. *Schwimmer*, 12 N.J. 293, 302 (1953). Under the parol evidence rule, the clear and unambiguous terms of a valid, integrated written instrument cannot be contradicted or varied by prior or contemporaneous extrinsic oral or written evidence. *Filmlife. Inc.* v. *Mal "Z" Ena, Inc.*, 251 N.J.Super. 570, 573 (App.Div. 1991) (quoting *Ocean Cape Hotel Corp.* v. *Masefield Corp.*, 63 N.J.Super. 369, 378 (App.Div. 1960)); *Madison Indus., Inc.* v. *Eastman Kodak Co.*, 243 N.J.Super. 578, 588 (App.Div. 1990). As mentioned, "[t]he question of whether a term is clear or ambiguous is ... a question of law." *Air Master Sales*, 748 F.Supp. at 1114. Parol evidence (evidence from outside of the contract), however, may be introduced to establish the contract is not binding, voidable or the result of fraud or mistake. *Mellon Bank Corp.* v. *First Union Real Estate Equity & Mortgage Inv.*, 951 F.2d 1399, 1404-05 (3d Cir. 1991).

The necessary inquiry, therefore, begins with an examination of the language of the 1984 Agreement. "Before a court can apply the parol evidence rule, it must determine whether the parties have adopted a writing as the final and complete expression of their agreement." *Fr. Winkler*, 839 F.2d at 1005; *see Thermice*, 832 F.2d at 252; *Atlantic N. Airlines*, 12 N.J. at 302. If the contract appears to be "'complete within itself, couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking were reduced to writing.'" *Mellon*, 951 F.2d at 1405 (citation omitted).

The 1984 Agreement appears without question to be a final and complete agreement between CCC and ISI. This is demonstrated by the length and detail of the contract. The 1984 Agreement was seventeen pages in length and included another twenty-three pages of appendices. *See generally* 1984 Agreement. The contract was also comprehensive of all aspects of the parties' agreement. It contained provisions detailing pricing, licensing and sub-licensing arrangements, insurance and indemnification, when and how the agreement could be terminated and further details of the rights and duties of each party. *Id.*

Most significantly, the 1984 Agreement contained a Merger Clause which clearly demonstrates the intent of the parties that the 1984 Agreement be recognized as their complete agreement. Specifically, the Merger Clause stated in part that the 1984 Agreement

> represents the entire agreement between the parties ... and shall supersede any other agreements, whether oral or written. *There are no understandings*, representations or warranties *of kind except as expressly set forth in this Agreement*.

Id., § 14.08 (emphasis added); *see Viceroy Fluid Power Int'l., Inc. v. Banks Engineering Co.*, 680 F.Supp. 725, 727 (W.D.Pa. 1988) (parol evidence inadmissible "particularly where the writing includes a clause prohibiting oral modifications").

The presence of an integrated agreement bars the introduction of inconsistent terms. *See Fr. Winkler*, 839 F.2d at 1005; *Thermice*, 832 F.2d at 252. Accordingly, "[a]ny evidence which cannot be read as consistent with the express terms of the contract, is simply irrelevant because of the principle that a contract will not

be given an interpretation that is in conflict with the express language." *Tigg*, 822 F.2d at 363.

The evidence ISI attempts to present of its belief that CCC would renew the 1984 Agreement directly contradicts the Termination Provision. As discussed, the Termination Provision was clear and unambiguous. Any evidence submitted by ISI that there was an extrinsic agreement or understanding that the 1984 Agreement would continue or be renewed is barred from consideration by the parol evidence rule because it is inconsistent with the Termination Provision.

> Absent an express option contract, a duty to contract beyond the terms of the contractual relationship itself is a contradiction in terms. This obtains in the face of the disappointed expectations of a party in the creation of a contract or the continuation of an existing one.

Rothermel, 163 N.J.Super. at 247.

c. The Enforceability of the Termination Provision

ISI argues that "[e]vidence to prove illegality, accident or mistake is admissible even though that evidence contradicts the terms of a complete integration in writing." ISI Opposition Brief at 15. ISI contends that the 1984 Agreement failed to reflect the true nature of the parties' agreement to enter into a relationship which would continue indefinitely. In addition, ISI argues the Termination Provision was unlawful because it violated New Jersey public policy which dictates that failure to renew in a franchise situation must be justified by good cause. *Id.* at 14. ISI argues, therefore, that it should be allowed to submit evidence of the Termination Provision's unenforceability.

As mentioned, parol evidence may be introduced in the event the contract is the result of fraud or mistake or is voidable or not binding. *See Mellon*, 951 F.2d at 1404. If the Termination Provision was unenforceable, parol evidence rule cannot bar evidence to that effect. As discussed below, however, those exceptions do not apply to the instant case. In addition, even if the "evidence" supporting the ISI belief that its relationship with CCC would continue indefinitely were considered, such evidence fails to establish a genuine issue of material fact.

i. Mistake

"The doctrine of mutual mistake applies when a 'mistake was mutual in that both parties were laboring under the same misapprehension as to [a] particular, essential fact.'" *Bonnco Petrol, Inc.* v. *Epstein*, 115 N.J. 599, 608 (1989) (quoting *Beachcomber Coins, Inc.* v. *Boskett*, 166 N.J.Super. 442, 446 (App.Div. 1979)). Mutual mistake "requires that both parties are in agreement at the time they attempt to reduce their understanding to writing, and the writing fails to express that understanding correctly." *St. Pius X House of Retreats, Salvatorian Fathers* v. *Diocese of Camden*, 88 N.J. 571, 579 (1982).

If a contract deviates in whole or in part from the agreement between the parties because of a mutual mistake, a court may reform the contract to express the actual terms of the agreement. *Bonnco Petrol*, 115 N.J. at 608. Under New Jersey law, the party seeking reformation must establish that "the minds of the parties have met and reached a prior existing agreement, which the written document fails to express." *Id.*

ISI contends it had an understanding with CCC that their relationship would continue indefinitely and suggests this is a reason for not applying the parol evidence rule in the instant case.

ISI Opposition Brief at 5-6, 15. This understanding is based on three particular incidents. None of those incidents, however, demonstrates that CCC ever promised ISI an exclusive distributorship in perpetuity. These incidents, therefore, do not illustrate the mutuality of the understanding, as required to establish mutual mistake.

First, ISI contends Suppes told Kaminer, at the beginning of the relationship, that "ISI would continue to be CCC's sole and exclusive distributor as long as ISI was able to meet reasonable marketing quotas." ISI Opposition Brief at 5; Kaminer Certif., ¶ 40. Despite this alleged statement by Suppes, Kaminer signed the 1975 Agreement which limited the term of the contract to 30 June 1977 and included a merger clause which stated that the written terms constituted the parties entire agreement. 1975 Agreement, ¶¶ XVIII, XXXI.

In 1977, when the parties were negotiating the 1978 Agreement, Kaminer wrote a letter with her comments on the then proposed agreement. *See* Letter, dated 1 August 1977, from Kaminer to "Joe," attached as Exhibit F to the Rosdeitcher Aff. One of her comments stated: "Region I cannot be withdrawn, ever and II and III cannot be withdrawn if quotas are met.... Term of agreement should not involve Group I and can only be cancelled after that time if quotas not met for II and III." *Id.*; *see* CCC Moving Brief at 10. CCC argues this was an attempt to obtain for ISI "perpetual distribution rights in certain states" and, in the other states, to establish rights which could only be cancelled if quotas were not met. CCC Moving Brief at 10. As illustrated by paragraph 9.4 of the 1978 Agreement which allowed either party to terminate the agreement upon thirty days' notice, Kaminer's comments were neither adopted nor the subject of agreement.

Throughout the relationship between ISI and CCC, ISI signed subsequent contracts with similar provisions, which allowed either party to terminate the contract with notice to the other after a specific date or set a particular expiration date for the contract. *See* 1978 Agreement, ¶ 9.4; 1980 Agreement, ¶ 9.4; 1984 Agreement, § 13.01; 1989 Agreement, § 13.1. Each contract between ISI and CCC also contained a merger clause which stated that the written agreement embodied the parties' *entire* agreement. *See* 1978 Agreement, Article XIX; 1980 Agreement, Article XX; 1984 Agreement, § 14.08; 1989 Agreement, § 14.8. Not only was ISI aware of those provisions, which conflict with its now asserted belief, but ISI also agreed with the rationale behind the need to have time limitations on the contractual period. ISI Opposition Brief at 5; Kaminer Certif., ¶ 24; Kaminer Dep. Tr. at 41-42.

Second, ISI refers to the 27 June 1977 Letter as proof that CCC and ISI had an understanding that the relationship would be continuous. The letter stated in pertinent part:

> Upon reflection, putting in the milestones on the north and south territories at the end of three years did not make much sense unless the contract were to continue after those dates. We are therefore writing a five-year contract with no conditions on the core territory as we discussed when you were here.

27 June 1977 Letter. Clearly the 27 June 1977 Letter stated that the next agreement would be for a term of five years. ISI does not explain how its understanding reconciles with the contemplated five-year time limitation.

The third basis for ISI's understanding is a statement allegedly made by Suppes sometime in the mid-1970s to Kaminer

that she was "queen of the east coast." Specifically, Kaminer recalled that

> [Suppes] made a remark that always struck me and I remembered it very well in which he said he was very pleased with the work we were doing and, ... he said a lot of things but the one of the remarks that I remember him saying was, as far as I'm concerned, you're queen of the east coast.

Kaminer Dep. Tr. at 30. Drawing from this statement the most favorable inferences possible, this alleged statement cannot possibly be construed as a promise by CCC to forever grant ISI an exclusive distributorship for CCC products. At best, it can be construed as an indication CCC believed that in the mid-1970's, ISI was doing a good job as a distributor of CCC products.

None of the evidence ISI wishes to present indicates that CCC agreed ISI would have a perpetual exclusive distributorship or that the Termination Provision was included in the 1984 Agreement through the mutual mistake of the parties. This is especially so in light of the overwhelming evidence to the contrary—the clear language in each agreement regarding termination and CCC's rejection of Kaminer's proposal that the parties establish such a continuous relationship.[32]

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[32] Even if the facts could be construed so as to demonstrate that ISI had a unilateral understanding it had an exclusive distributorship in perpetuity, this would not be enough to hold the Termination Provision unenforceable. Rescinding a provision of a contract based on a unilateral mistake of one of the parties requires that

> the mistake ... be of so great a consequence that to enforce the contract as actually made would be unconscionable.

(continued...)

ii. Unconscionability/Illegality

ISI argues throughout its opposition to the CCC summary judgment motion that the Termination Provision was unconscionable. ISI Opposition Brief at 10, 18, 22. ISI further suggests the unconscionability of the Termination Provision provides a basis for not applying the parol evidence rule. *Id.* at 15.

"The doctrine of unconscionability comes into play when two factors coincide: 'grossly disproportionate bargaining power' between the parties which has in fact led to 'grossly unfair contractual provisions.'" *Jefferson Loan Co. v. Livesay*, 175 N.J.Super. 470, 479 (Law Div. 1980) (quoting *Shell Oil Co.* v. *Marinello*, 63 N.J. 402, 408 (1973), *cert. denied*, 415 U.S. 924 (1974)); *cf. Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 303 (doctrine of unconscionability of Uniform Commercial Code "developed to protect the disadvantaged party in a one-sided bargain"), *modified on other grounds*, 101 N.J. 10 (1985); *Humble Oil & Refining Co. v. Doerr*, 123 N.J.Super. 530, 564 (Ch.Div. 1973) (applying equitable principles in action brought to enforce purchase option). Where a contract or one of its terms is unconscionable, "nonenforcement of its terms may be justified on other than such traditional grounds as fraud, duress, mistake or illegality." *Rudbart* v. *Water Supply Comm'n*, 127 N.J. 344, 353, *cert. denied sub nom., First Fidelity Bank, N.A.* v. *Rudbart*, ___ U.S. ___, 113 S.Ct. 203 (1992).

[W](...continued)
1949)).

As discussed below, there is no indication that enforcement of the Termination Provision was unconscionable. Accordingly, the first element of unilateral mistake is missing. In addition, the facts proffered by ISI to demonstrate mistake do not support a reasonable belief on the part of ISI that it had an exclusive distributorship in perpetuity.

The primary basis of ISI's argument that the Termination Provision was unconscionable is that the provision violated public policy. ISI relies primarily on the case of *Shell*, 63 N.J. 402, for its argument. ISI Opposition Brief at 15-18. The *Shell* court stated:

> Where there is grossly disproportionate bargaining power, the principle of freedom to contract is non-existent and unilateral terms result. In such a situation, courts will not hesitate to declare void as against public policy grossly unfair contractual provisions which clearly tend to the injury of the public interest in some way.
>
> *Id.* at 408.

Shell involved a set of agreements, including a lease and a distribution agreement, between Shell Oil Company ("Shell") and the plaintiff who was one of Shell's service station operators. Over a ten year period, Shell and the plaintiff entered into agreements which had one-year terms but were regularly renewed upon their expiration. The last set of agreements between Shell and the plaintiff was for a three-year term and either party was allowed to terminate the agreements upon notice to the other party after the expiration of the three-year period. Upon the expiration of the three-year period, Shell gave the plaintiff notice that it was terminating the agreements; the plaintiff sued to enjoin such termination. The New Jersey Supreme Court determined that the provisions in the agreements which allowed Shell to terminate the contracts at will were the "result of Shell's disproportionate bargaining position and [were] grossly unfair." Id. at 409.

The court in *Shell* stressed the importance of the particular facts in its decision. *Id.* at 407. The disparity of bargaining power which existed between Shell and the plaintiff and led the court to determine that the termination-at-will provision was "grossly

unfair," does not exist in this case. Shell, a "major oil company," sold its products in "hundreds of Shell service stations throughout the State." *Id.* at 404, 407. Shell's impact on the state was so great the court determined that the "public is affected in a direct way." *Id.* at 409. The factual situation in the instant case does not approach the circumstances in *Shell*.

The instant case involves two privately owned and run companies. CCC is not a company of the magnitude of Shell and the only presence it has in the state of New Jersey is through its arrangement with ISI. The relationship between Kaminer, with her impressive educational background and experience in the field of computers, and Suppes, who also has an impressive background in developing programs for computer-assisted education, does not present the "gross disparity in bargaining power" that concerned the *Shell* court. The fact ISI, at one point, put together an offer with the intent of purchasing CCC, further belies the type of disparity necessary to find a contractual arrangement unconscionable.

A common theme underlying cases which have found contracts to be unconscionable is the notion that the plaintiff is not the only person or entity at risk of being harmed by defendant's actions. Cases which have found the disparity in bargaining power to have risen to the level of unconscionability have also found that the general public is threatened in some way by the actions of the defendant. This is illustrated by the cases cited by ISI. *See, e.g., Rudbart*, 127 N.J. at 356; *Ellsworth Dobbs, Inc.* v. *Johnson*, 50 N.J. 528, (1967); *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, 404 (1960); *Shell*, 63 N.J. at 409. In the instant case, to the contrary, CCC's actions pose no threat to the general public.

ISI relies on the holding in *Shell* to argue that New Jersey public policy, as the uncodified version of the Franchise Practices Act, dictates that the Termination Provision was unconscionable. The holding in *Shell* was guided in part by the then recent enactment of the Franchise Practices Act. *Id.* Although the dispute between Shell and the plaintiff arose prior to the enactment of the Franchise Practices Act, the court stated that the statute

> reflects the legislative concern over long-standing abuses in the franchise relationship, particularly provisions giving the franchisor the right to terminate, cancel, or fail to renew the franchise. To that extent the provisions of the [Franchise Practices] Act merely put into statutory form the extant of public policy of [the] state [of New Jersey].

Id. To the extent ISI argues that New Jersey common law dictates the same results upon extraterritorial application as the Franchise Practices Act, those arguments fail.

To the extent ISI argues that New Jersey common law public policy prohibits franchisors from terminating a franchise without good cause, the argument fails because such a policy would be preempted by the Franchise Practices Act. *See Horn*, 265 N.J.Super. at 53 n.2; *Tynan*, 248 N.J.Super. at 670; *see Freedman Truck*, 784 F.Supp. at 178.

As discussed, in order for common law to apply, ISI would have to be found not to be a franchisee under the Franchise Practices Act and/or the extraterritorial application of the act would have to be precluded. In the event ISI is found not to have a franchise, the public policy, as described by ISI, would not apply.

If the application of the Franchise Practices Act outside of New Jersey violates the Commerce Clause, the extraterritorial

application of any analogous public policy is similarly barred for the reasons articulated in *Instructional Systems II.* A state's common law is not immune from constitutional restrictions.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Supreme Court stated:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265; *see also Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) ("[f]or state action purposes it makes no difference ... whether [an] act ... is compelled by a statutory provision or by a custom having the force of law"); *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362, 369 (1939) (in determining a constitutional violation, Court stated "[i]t would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books").

ISI cannot escape the determination that extraterritorial application of the Franchise Practices Act violates the Commerce Clause by contending that uncodified New Jersey public policy achieves the same result in the act's absence. New Jersey common law public policy may not accomplish that which cannot be accomplished by New Jersey statutes.

4. Count 3—Breach of Implied Covenant of Good Faith and Fair Dealing

As a general rule, courts may not write into a contract provisions which the parties omitted or to modify terms to which they agreed in the absence of equitable reasons to the contrary.

> [W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written.... [C]ourts [may not] remake a better contract for the parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other.

Karl's Sales, 249 N.J.Super. at 493 (citations omitted); *see James* v. *Federal Ins. Co.*, 5 N.J. 21, 24 (1950); *Moscowitz* v. *Middlesex Borough Bldg. & Loan Ass'n*, 14 N.J.Super. 515, 521 (Law Div. 1951), *aff'd*, 18 N.J.Super. 182 (App.Div. 1952).

Against this backdrop, an exception to the general rule is the implied covenant of good faith and fair dealing.

> "In every contract, there is an implied covenant that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.'"

W.V. Pangborne & Co. v. *New Jersey Dep't of Transp.*, 116 N.J. 543, 560 (1989) (citations omitted); *see Pickett* v. *Lloyd's*, 131 N.J. 457, 467 (1993); *Noye* v. *Hoffmann-La Roche, Inc.*, 238 N.J.Super. 430, 432 (App.Div.), *certif. denied*, 122 N.J. 146 (1990); *Bak-A-Lum Corp. of Am.* v. *Alcoa Bldg. Prods., Inc.*, 69

N.J. 123, 129-30 (1976); *Palisades Properties, Inc.* v. *Brunetti*, 44 N.J. 117, 130 (1965); *see also W.A. Wright, Inc.* v. *KDI Sylvan Pools, Inc.*, 746 F.2d 215, 218 (3d Cir. 1984). A covenant of good faith and fair dealing "involve[s] an implied duty to bring about a condition or to exercise discretion in a reasonable way." *USX Corp.* v. *Prime Leasing, Inc.*, 988 F.2d 433, 435 (3d Cir. 1993). Such implied terms are interpreted in accordance with principles of commercial reasonableness. *See Glenside West Corp.* v. *Exxon Co., U.S.A., Div. of Exxon Corp.*, 761 F.Supp. 1100, 1112 (D.N.J. 1991).

The Complaint alleges that CCC's refusal to renew the exact terms of the 1984 Agreement constitutes a breach of implied covenant. *See* Complaint, ¶ 49. However, ISI's request that a renewal term be read into the 1984 Agreement, requiring CCC to extend or renew the exact terms of the 1984 Agreement upon its expiration on 31 July 1989, directly contravenes a written provision in the contract.

While certain unwritten covenants may be implied to effect the true meaning of a contract's terms, "'it is not the province of the court to make a new contract or supply any material stipulations or conditions which contravene the agreements of the parties.'" *Onderdonk* v. *Presbyterian Homes of N.J.*, 85 N.J. 171, 183 (1981) (citation omitted).

> "The law will imply a term only for omitted covenants. There can be no implied covenant as to any matter specifically covered by the written contract between the parties." Thus it is only "[i]n the absence of an express provision, [that] the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made...."

USX Corp., 988 F.2d at 439 (citations omitted); *see Borbely*, 547 F.Supp. at 975.

In an analogous case, the court in *Rothermel*, 163 N.J.Super. 235, declined to impose liability based on a breach of implied covenant of good faith and fair dealing. *Id.* at 248. In that case, the plaintiff, a company which bought paper from the manufacture and then resold it, sued the defendant paper manufacturer based on the defendant's refusal to renew the supply contracts. The defendant determined that it would be more efficient for it to eliminate the plaintiff and directly sell its own products. The defendant gave the plaintiff notice, as required under the written agreements, and terminated the supply contracts.

> Recognition of the consensual nature of the contract relationship necessarily includes the right of one not to consent to such a relationship. If one were to be held liable in tort for rejection of an offer to contract or for termination of an existing contractual relationship according to its terms, the characteristically consensual nature of the contract relationship would be undermined. Absent an express option contract, a duty to contract beyond the terms of the contractual relationship itself is a contradiction in terms.[24]

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[24] ISI argues that the Termination Provision should be overridden by the implied covenant of good faith and fair dealing and cites *Bak-a-Lum*, 69 N.J. 123, in support of that proposition. ISI Opposition Brief at 20. The decision in *Bak-A-Lum*, however, is factually and legally distinguishable from the instant case.

Bak-A-Lum, involved a suit by an aluminum siding salesman against the aluminum siding manufacturer. The parties entered into an oral agreement whereby the plaintiff was made the exclusive distributor of the defendant's products in northern New Jersey. Several years later, with no warning to the plaintiff, the defendant appointed four other salespeople to distribute its products

(continued...)

Id.

ISI argues that "[w]here a term of the contract contains an implied covenant of good faith and fair dealing, then such a covenant will be implied as a term of the contract or give rise to a duty between the parties." ISI Opposition Brief at 19. ISI, essentially, advocates the implication of a covenant in the 1984 Agreement which would be in direct contravention of an express and unambiguous provision in that contract. As a matter of law, that proposition is not acceptable. *See USX Corp.*, 988 F.2d at 439; *Borbely*, 547 F.Supp. at 975.

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[49](...continued)
in the area assigned to the plaintiff. The plaintiff sued to enjoin the termination of his exclusive distributorship without "good cause." The trial court refused to issue a preliminary injunction, but did find that the parties had a binding agreement and that the agreement was terminable only upon a "reasonable" notice period. The trial court then determined a reasonable notice period consisted of seven months.

On appeal, the New Jersey Supreme Court determined that twenty months was a reasonable notice period. Specifically, the court stated that while "[i]t may be true that [the] defendant ordinarily would be under no strictly legal obligation to inform [the] plaintiff that it was about to terminate its exclusive distributorship," the implied covenant of good faith and fair dealing justified such a result under the circumstances of the case. *Id.* at 129-30. It is clear that the court in *Bak-A-Lum* was not imposing an inconsistent term to the existing agreement between the parties. Rather, the court first read a provision requiring reasonable notice into an oral agreement, and then interpreted "reasonable notice" to constitute twenty months under the circumstances of that case.

To the contrary, there is no provision in the 1984 Agreement which is in similar need of interpretation. As discussed, the Termination Provision clearly and unambiguously provided for the expiration of the 1984 Agreement as of 31 July 1989. No action was required on the part of ISI or CCC; the agreement simply expired by its terms. Any attempt to imply into the 1984 Agreement an obligation to renew would directly contradict the Termination Provision.

ISI and CCC agreed in the 1984 Agreement, as they had in previous agreements, that the term of the contract would extend only until a definite date. The parties did not include any provisions in the 1984 Agreement which dictated that the parties take some particular action upon the expiration of the contract or even give notice of termination. Specifically, there was no provision which required CCC to automatically renew the 1984 Agreement. Accordingly, the 1984 Agreement clearly contemplated termination in 1989 without further action.

CCC did nothing to damage any of ISI rights under the 1984 Agreement. On 31 July 1989, the 1984 Agreement terminated in accordance with its provisions; the parties were then free to enter into a new contract. ISI had no enforceable legal right under the 1984 Agreement to have the 1984 Agreement renewed or continued in the exact same form. There are no genuine issues of material fact which would preclude summary judgment as to Count Three.

5. Count 4—Tortious Interference with Prospective Economic Advantage

The Complaint alleges that the "acts and omissions of CCC [in refusing to renew the exact terms of the 1984 Agreement] constitute tortious interference with ISI's prospective economic advantage in that, *inter alia*, business relationships between ISI and prospective customers have been and will be interfered with by CCC."[15] Complaint, ¶ 52.

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[15] This claim is based on CCC's alleged interference with ISI's prospective relationships with potential customers of CCC products and not on the non-renewal of the 1984 Agreement. Accordingly, it appears ISI satisfies the requirement that "a cause of action sounding in tortious interference with

(continued...)

The legal rationale behind a claim of tortious interference with prospective economic advantage is to protect interests in reasonable expectations of economic advantage from outside interference. *Printing Mart-Morristown* v. *Sharp Elecs. Corp.*, 116 N.J. 739, 750, 752 (1989); *C.R. Bard, Inc.* v. *Wordtronics Corp.*, 235 N.J.Super. 168, 171-72 (Law Div. 1989). In New Jersey, an action for tortious interference with prospective business relations "protects the right 'to pursue one's business, calling or occupation free from undue influence or molestation.'" *Printing Mart-Morristown*, 116 N.J. at 750 (quoting *Louis Kamm, Inc.* v. *Flink*, 113 N.J.L 582, 586 (E&A 1934)). A *prima facie* case entails the "'luring away, by devious, improper and unrighteous means, of the customer of another.'" *Printing Mart-Morristown*, 116 N.J. at 750 (quoting *Kamm*, 113 N.J.L. at 586).

Under New Jersey law, the following elements must be proven to establish a cause of action for tortious interference with prospective economic advantage: (1) a reasonable expectation by the plaintiff of an economic advantage; (2) the defendant's knowledge of that expected economic advantage; (3) the defendant's malicious interference with the plaintiff's expected economic advantage; (4) that without the defendant's interference, it was reasonably probable that the plaintiff would have realized the economic advantage; and (5) that the plaintiff was damaged by the defendant's interference. *See Printing Mart-Morristown*, 116 N.J. at 750; *Rainier's Dairies* v. *Raritan Valley Farms, Inc.*, 19 N.J. 552, 563 (1955); *Zippertubing Co.* v. *Teleflex, Inc.*, 757 F.2d 1401, 1409 (3d Cir. 1985); *Michael Halebian N.J., Inc.* v. *Roppe Rubber Corp.*, 718 F.Supp. 348, 361 (D.N.J. 1989).

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[19](...continued)
contractual obligations ... be directed against a third party." *Kopp. Inc.* v. *United Technologies, Inc.*, 223 N.J.Super. 548, 559 (App.Div. 1988).

Generally, the claim must be based on a cognizable right such as an economic or contractual relationship and the interference with that right must be intentional and malicious. *Printing Mart-Morristown*, 116 N.J. at 751. Such interference, moreover, must have caused the loss of the prospective gain which must cause damage to the plaintiff. *Id.* at 751-52.

Malice connotes committing a wrongful act intentionally, without justification or excuse. A malicious act is

> "any act which will, in the ordinary course, infringe upon the rights of another to his damage, *except and unless it be done in the exercise of an equal or superior right.*"

Kopp, 223 N.J.Super. at 560 (emphasis in original) (citation omitted); *see Levin* v. *Kuhn Loeb & Co.*, 174 N.J.Super. 560, 573 (App.Div. 1980); *Trump Taj Mahal Assoc.* v. *Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F.Supp. 1143, 1163 (D.N.J. 1991) (citing *Norwood Easthill Assocs.* v. *Norwood Easthill Watch*, 222 N.J.Super. 378, 384-85 (App.Div. 1988)), *aff'd mem.*, 958 F.2d 365 (3d Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 84 (1992); *Labus* v. *Navistar Int'l Transp. Corp.*, 740 F.Supp. 1053, 1063 (D.N.J. 1990); *Borbely*, 547 F.Supp. at 976. In other words, "[t]hat which one has a right to do cannot become a tort when it is done." *Rothermel*, 163 N.J.Super. at 244; *Kopp*, 223 N.J.Super. at 560; *see also Glasofer Motors v. Osterlund, Inc.*, 180 N.J.Super. 6, 26 (App.Div. 1981).

The facts, construed in a light most favorable to ISI, show that CCC was not under any contractual obligation to renew the 1984 Agreement. As mentioned, the 1984 Agreement contained an express provision for automatic termination on 31 July 1989. CCC had a right to allow the 1984 Agreement to expire on 31 July 1989. Accordingly, the element of malice is not present in the

instant case because CCC had no contractual obligation to renew the 1984 Agreement. In *Kopp*, the court determined that there was no tortious interference because the defendant had no contractual obligation to act in the way plaintiff desired. *Id.* at 560.

In response, ISI contends that CCC, by arguing that it had no contractual obligation to renew the 1984 Agreement,

> assumes a right which the New Jersey Supreme Court has held CCC did not have, *i.e.*, the right to terminate ISI without good cause.
>
> As set forth above, the New Jersey Supreme Court has decided that the nature of the relationship between ISI and CCC is that of a franchise. As a matter of public policy of this State, that relationship could not be terminated without good cause.

ISI Opposition Brief at 22. This argument ignores several facts. First, the argument confuses the issues raised by Count One under the Franchise Practices Act with those raised by Count Four which is a common law count. As discussed, to the extent the Franchise Practices Act governs the parties' dispute, Count Four is preempted. Second, only a few specific issues, all involving a portion of Count One, were remanded to the state courts. The New Jersey Supreme Court in *N.J. Sup. Ct. Instructional Systems* was, therefore, never presented with Count Four or, for that matter, any of the Common Law Counts, and, indeed, never addressed such issues.

CCC, had a contractual right to permit the 1984 Agreement to expire with respect to the Eight states and, in fact, the Marketing Territory. Accordingly, CCC, as a matter of law, cannot be determined to have tortiously interfered with ISI's

prospective economic disadvantage. Summary judgment as to Count Four is, therefore, appropriate.

6. Count 5—Unfair Competition

ISI alleges that there was "a covenant of non-competition by CCC implied by the relationship and the [1984] Agreement" which CCC breached by failing to renew the 1984 Agreement as to the Eight States. *See* Complaint, ¶ 55. Accordingly, ISI alleges a claim of unfair competition.

The elements of a cause of action for unfair competition were set out in *C.R. Bard.*

> "One who intentionally causes a third person not to enter into a prospective contractual relation with another *who is his competitor* or not to continuing an existing contract terminable at will does not interfere improperly with the other's relation if
> (a) the relation concerns a matter involved in the competition between the actor and the other and
> (b) the actor does not employ wrongful means and
> (c) his action does not create or continue an unlawful restraint of trade and
> (d) his purpose is at least in part to advance his interest in competing with the other.

235 N.J.Super. at 172 (citation omitted) (emphasis added); *see also American Shops, Inc.* v. *American Fashion Shops of Journal Square*, 13 N.J.Super. 416, 424 (App.Div.), *certif. denied*, 7 N.J. 576 (1951).

ISI has failed to satisfy the preliminary requirement for unfair competition which is that ISI and CCC be competitors. *See*

New Jersey Optometric Ass 'n v. *Hillman-Kohan Eyeglasses, Inc.*, 144 N.J.Super 411, 428 (Ch.Div. 1976) (court dismissed unfair competition claim because the plaintiff was a trade association which could not be in competition with defendants), *aff'd*, 160 N.J.Super. 81 (App.Div. 1978). The 1989 Agreement does not result in CCC competing with ISI in the Eight States or the Three State Marketing Territory. ISI maintains its exclusive distributorship in the Three State Marketing Territory and has no right to sell CCC products in the Eight States. Accordingly, the necessary element of competition is missing.

Furthermore, there are no facts which suggest CCC used unlawful or wrongful means to terminate ISI's ability to market CCC products in the Eight States. As discussed, the 1984 Agreement contained an explicit Termination Provision which imposed a definite time limitation on the 1984 Agreement. Accordingly, termination of the 1984 Agreement by CCC was not unlawful or wrong.

7. Count 6—Unjust Enrichment

ISI alleges that

> The aforesaid acts and omissions of ... CCC, including but not limited to the withdrawal of certain states from ISI's exclusive territory, constitutes unjust enrichment in that ISI, at the direction of CCC, has expended substantial resources in developing those territories under it [f)ranchise and CCC will reap the benefits of ISI's efforts.

Complaint, ¶ 58.

"The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself at the expense of another." *Associates Commercial Corp.* v *Wallia*, 211 N.J.Super. 231, 243 (App.Div. 1986) (citing *Callano* v. *Oakwood Park Homes Corp.*, 91 N.J.Super. 105, 108 (App.Div. 1966)); *see also Dunkin' Donuts*, 100 N.J. at 184; *Insulation Contracting & Supply* v. *Kravco, Inc.*, 209 N.J.Super. 367, 375 (App.Div. 1986) ("invoked to prevent unjust enrichment of unconscionable benefits or advantage"). "The key words are enrich and unjustly." *Callano*, 91 N.J.Super. at 109.

The concept of unjust enrichment is based on a quasi-contractual relationship imposed for equitable reasons.

> Contracts implied by law, more properly described as *quasi* or constructive contracts ... rest solely on a legal fiction and are not contract obligations at all in the true sense.... Courts employ the fiction of *quasi* or constructive contract with caution.

Callano, 91 N.J.Super. at 108; *see Russell-Stanley Corp.* v. *Plant Indus.*, 250 N.J.Super. 478, 509 (Ch.Div. 1991).

Under New Jersey law, the existence of a valid contract is a bar to a finding of unjust enrichment. *Van Orman* v. *American Ins. Co.*, 680 F.2d 301, 311 (3d Cir. 1982).

> "It is a 'well settled rule that an express contract excludes an implied one. An implied contract cannot exist when there is an existing express contract about the identical subject. The parties are bound by their agreement, and there is no ground for implying a promise. It is only when the parties do not agree that the law interposes and raises a promise. When an express contract exists, there must be a rescission of it before

> the parties will be remitted to the contract which the law implies, in the absence of that agreement which they made for themselves.'"

C.B. Snyder Realty Co. v. *National Newark & Essex Banking Co.*, 14 N.J. 146, (1953) (quoting *Moser* v. *Milner Hotels, Inc.*, 6 N.J. 278, 280-81 (1951) (citation omitted).

The court in *St. Paul Fire & Marine Ins. Co.* v. *Indemnity Ins. Co.*, 32 N.J. 17 (1960) stated:

> [I]f the conduct of [the] defendant, objectively viewed, reveals a promise to pay, [the] defendant must meet that obligation whatever may have been its unrevealed expectation.

Id. at 24. Unless the "plaintiff, on the strength of [the] defendant's promise, [did] anything more or different from what it would or should have done in discharge of its own obligations," there is no unjust enrichment. *Id.* at 26. A crucial tenet of the doctrine of unjust enrichment is "'that the plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred.'" *Associates Commercial*, 211 N.J.Super. at 244 (quoting *Callano*, 91 N.J.Super. at 109).

In the instant case, there was a valid contract involving the identical subject upon which ISI seeks relief. There is nothing to suggest CCC was enriched beyond its contractual right. It appears that ISI's investments in CCC products and equipment and the work it undertook in promoting CCC products and building good will in the Marketing Territory fell within the obligations of the various contracts between ISI and CCC. Indeed, because of ISI's position as a distributor of CCC products, it is logical to view such

efforts as necessary for ISI's success and profitability. Construing all facts and drawing all inferences in favor ISI and assuming ISI did everything it contends it did in building a market for CCC products in the northeastern United States, there is no basis for a finding of unjust enrichment in light of ISI contractual obligations under the 1984 Agreement.

8. Count 7—Breach of Fiduciary Duty

ISI asserts, in count seven of the Complaint, that CCC breached its fiduciary duty to ISI by "consistently requir[ing] specific terms to be in the [1989] Agreement as a result of its superior bargaining position, and ISI is given little opportunity to negotiate terms of the [1989] Agreement." Complaint, ¶ 63. ISI further claims CCC's fiduciary duty arose from "a vast disparity in the relative bargaining positions as well as business knowledge and expertise between CCC and ISI in terms of bargaining position." *Id.*, ¶ 62. ISI, therefore, argues a fiduciary relationship existed between it and CCC, that by virtue of that relationship ISI was susceptible to the exertion of undue influence over it by CCC and that it was harmed by CCC's decision not to renew the exact terms of the 1984 Agreement. ISI Opposition Brief at 28-29.

ISI further implies that its position as a franchisee under the Franchise Practices Act further supports the existence of a fiduciary duty on the part of CCC. *See* ISI Opposition Brief at 28-30. This argument demonstrates ISI, once again, has confused its claims under the Franchise Practices Act with its Common Law Counts. As discussed, to the extent the Franchise Practices Act governs this dispute, Count Seven is preempted.

No fiduciary relationship automatically exists between a franchisor and franchisee under New Jersey law. *Glenside West*, 761 F.Supp. at 1116; *see Sandler* v. *Lawn-A-Mat Chem. & Equip.*

Corp., 141 N.J.Super 437, 450-51 (App.Div.) ("no special relationship" between distributor and franchisor), *certif. denied*, 71 N.J. 503 (1976); *Newark Motor Inn Corp.* v. *Holiday Inns, Inc.*, 472 F.Supp. 1143, 1151-52 (D.N.J. 1979).

Instead, it must be determined from the factors of ISI's relationship with CCC whether CCC owed a fiduciary duty to ISI and whether it breached that duty.

> A fiduciary relationship is one founded on trust or confidence placed by one person in the integrity and fidelity of another person. Out of such a relation, the law requires that neither party exert undue influence or pressure upon the other, take selfish advantage of his trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with full knowledge and consent of the other person involved.

Glenside West, 761 F.Supp. at 1116 (citing *Arnott* v. *American Oil Co.*, 609 F.2d 873, 881 n.7 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980)).

While ISI attempts to portray a "Goliath/David" inequality in its relationship with CCC, the facts belie such a characterization. Even under the assumption that ISI is a franchise, ISI and CCC's relationship is unlike that of a typical franchise where the franchisor is an entity of "nationwide size, purchasing power and technical know-how" and the franchisee is a only a local entrepreneurship. *See Newark Motor Inn*, 472 F.Supp. at 1152. As explained, at the outset of their relationship, ISI and CCC were both relatively small companies privately owned by sophisticated persons knowledgeable about the computer industry.

CCC was not a national corporation seeking to establish a nation-wide chain of CCC distributors, rather it was a small company which had experienced regional success in marketing the educational software and hardware it had created. ISI appears to have been founded for the express purpose of selling educational software and hardware. In fact, ISI was engaged in that business prior to its relationship with CCC; ISI sought out CCC. Although CCC had contemplated expanding its marketing efforts into the northeastern United States, it does not appear that CCC had taken any specific steps in that direction until it was approached by ISI. Further undercutting any characterization of ISI's relationship with CCC as a Goliath/David situation, is the undisputed fact that ISI attempted to buy CCC in 1985.

From the facts presented, it cannot be said Kaminer and Suppes were anything other than arms-length bargaining parties. ISI attempts to recharacterize the relationship based on its alleged unilateral belief that CCC would continue unchanged the relationship with ISI indefinitely. There are no genuine issues of material fact indicating CCC occupied a position of fiduciary trust for ISI or lulled or misled ISI into the belief their relationship could not be changed.

Conclusion

For the foregoing reasons, CCC's summary judgment motion is granted as to that portion of Count One which alleges a violation of N.J.S.A. § 56:10-5 and as to Counts Two through Seven;

CCC's summary judgment motion is denied as to that portion of Count One which alleges a violation of N.J.S.A. § 56:10-7(e).

An order accompanies this opinion.

/s/
ALFRED J. LECHNER, JR., U.S.D.J.

AJL:dmh
cc: Philip Selecky, Deputy Clerk

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